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Supr. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 67

J. I. CASE COMPANY, PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 21, 1943.

CERTIORARI GRANTED JUNE 21, 1943.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.

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vs.

NATIONAL LABOR RELATIONS BOARD

A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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BEFORE THE NATIONAL LABOR RELATIONS BOARD, THIRTEENTH REGION

In the Matter of J. I. Case Company and International Union, United Automobile, Aircraft & Agriculture Implement Workers of America, C. I. O.

Case No. XIII-C-1818

Date Filed, March 27, 1942. Docketed C. M. C.

First Amended Charge—Filed April 16, 1942

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that J. I. Case Company at Rock Island, Illinois, employing 700 workers in manufacture and sale of agricultural implements and tractors, has engaged in and is engaging in unfair labor practices within the meaning of Section 8 subsections (1) and (5) of said Act, in that

(a) The Company, by its officers and agents, did cause its employees individually to enter into employment contracts with respondent in order to defeat the right of its employees to form, join, or assist labor organizations and to bargain collectively through representatives of their own choosing; and that the contracts deprive its employees of the right to bargain collectively through representatives [fol. 6] of their own choosing and further deprive the employees of the right to engage in concerted activities for their mutual aid or protection;

(b) The Company, by its officers and agents, has since the date of certification of the above named union by the National Labor Relations Board and at all times thereafter, repeatedly refused to bargain collectively with the union as the exclusive bargaining representative of its employees.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also

the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O., by H. D. Burcham, International Representative, 318 Robinson Building, Rock Island, Ill.

Duly sworn to by H. D. Burchman. Jurat omitted in printing.

[fol. 7] BEFORE THE NATIONAL LABOR RELATIONS BOARD

[Title omitted]

AMENDED COMPLAINT—Filed April 16, 1942

It having been charged by International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organization, hereinafter called the union, that J. I. Case Co., a corporation, hereinafter called respondent, has engaged and is now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, 49 Stat. 449, hereinafter called the Act, the National Labor Relations Board, hereinafter called the Board, by the Acting Regional Director for the Thirteenth Region, as agent for the Board, designated by Board Rules and Regulations, Series 2, as amended, for its Amended Complaint against respondent, hereby alleges the following:

1. Respondent is and has been at all times hereinafter related, a corporation organized under and existing by virtue of the laws of the State of Wisconsin, and operates and maintains several plants, including the plant involved in the instant case at Rock Island, Illinois.

2. Respondent is now and at all times hereinafter mentioned has been engaged at the Rock Island plant, hereinafter called the plant, in the manufacture and sale of farm implements and farm machinery.

[fol. 8] 3. Respondent in the due course and conduct of its business and in the operation of the plant, at all times herein material, did cause and has continuously caused, large

quantities of raw materials and supplies to be purchased and transported in interstate commerce from points outside the State of Illinois to the plant in the State of Illinois, and did cause and has continuously caused large quantities of farm implements and machinery manufactured at the plant in the State of Illinois to be sold and transported in interstate commerce from the plant to points outside the State of Illinois.

Respondent during the year 1940, in the operation of the plant, did purchase raw materials and supplies valued at approximately $1,000,000. Of this amount, approximately 80 per cent was purchased at points outside the State of Illinois and caused to be transported in interstate commerce from and through States of the United States other than the State of Illinois to the plant in the State of Illinois. Respondent during the year 1940 sold finished products manufactured at the plant in an amount in excess of $2,000,000, of which amount approximately 80 per cent was shipped in interstate commerce from the plant in the State of Illinois to, into and through States of the United States other than the State of Illinois.

4. The union is a labor organization as defined in Section 2, subdivision (5) of the Act.

5. Respondent, by its officers, agents and employees, while engaged in the operation of the plant from on or about 1937 and at various times thereafter, did offer to each and every one of its employees and did execute with each of approximately 75 per cent of its employees, individually, employment contracts, a representative copy of which is hereto attached as exhibit "A" and made a part hereof, in order to: abrogate, negate and circumvent the right of its employees to form, join, or assist labor organizations; to deprive its employees of the right to bargain collectively through representatives of their own choosing; interfere with, restrain, and coerce its employees in the exercise of their right to negotiate with respondent [fol. 9] with respect to wages, hours and other conditions of employment; and to obstruct, prevent and defeat any concerted activities among its employees for the purpose of collective bargaining or other mutual aid or protection, and for these reasons, and each of them, said individual contracts are unenforceable and void as to respondent.

6. In order to insure to the employees the full benefit of their right to self-organization and otherwise to effectuate the policies of the Act, all production and maintenance employees of respondent employed at the Rock Island plant, including Charles R. (Whitey) Clausen, Johnny Waters, Oliver Gordon, Walter Coghill, Frank DeFreeze and Hank De Vooght, excluding office and clerical employees, and Paul Eastland, Russel Johnson, Loyd Cousin, and other supervisory employees, and pattern makers and pattern makers' apprentices, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9 (b) of the Act, hereinafter called the unit.

7. On or before February 13, 1942, a majority of the employees in the aforesaid unit, designated the union as its representative for the purpose of collective bargaining with respondent, such designation having been made, pursuant to a Direction of Election issued by the Board on January 26, 1942, in an election by secret ballot held on February 13, 1942, and at all times since February 13, 1942 the union has been the exclusive representative of all employees in the unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment.

8. On or about March 7, 1942, and at all times thereafter, while respondent was engaged in the operation of the Rock Island plant as described above in paragraph 3, the union requested respondent to bargain collectively with respect to rates of pay, wages, hours of employment and other conditions of employment with the union as the exclusive representative of all the employees of respondent in the unit. On March 7, 1942, and at all times thereafter, respondent did fail and refuse and has continuously failed and refused to bargain collectively with the union in that [fol. 10] it did fail and refuse and has continuously failed and refused to recognize or negotiate with the union as the exclusive representative of all the employees in the unit in respect to rates of pay, wages, hours of employment, or other conditions of employment.

9. Respondent, by the acts set forth in paragraph 8 hereof, did engage in and is engaging in unfair labor practices within the meaning of Section 8, subdivision (5) of the Act.

10. By the acts described above in paragraphs 5 and 8 hereof, and by each of said acts, and by entering into, maintaining and enforcing the contracts referred to in paragraph 5 hereof, and by stating to its employees that said contracts were a bar to the selection of a collective bargaining representative and that respondent would not bargain with the union as the exclusive representative of all the employees in the unit in respect to rates of pay, wages, hours of employment, or other conditions of employment during the term of said contracts respondent did interfere with, restrain and coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act; and by all of said acts and by each of them, respondent did engage in and is engaging in unfair labor practices within the meaning of Section 8, subdivision (1) and Section 2, subdivisions (6) and (7) of the Act.

11. The acts of respondent as set forth in paragraphs 5, 8, and 10 hereof, occurring in connection with the operations of respondent described in paragraphs 2 and 3 hereof, have a close, intimate and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

12. The aforesaid acts of respondent set forth in paragraphs 5, 8, and 10 hereof, constitute unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1) and (5) and Section 2, subdivisions (6) and (7) of the Act.

Wherefore, the Board on this 9th day of April, 1942 [fol. 11] issues its Amended Complaint against J. I. Case Company, respondent herein.

Walter E. Taag, Acting Regional Director, 13th Region, National Labor Relations Board.

Copy received this 13th day of April, 1942.

J. I. Case Co., by C. M. Robertson, Counsel.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

[Title omitted]

AMENDED ANSWER—Filed April 16, 1942

Now comes the respondent, J. I. Case Company, and by way of answer to the amended complaint herein alleges:

1. Admits the allegations of Paragraphs 1, 2, 3 and 4.

2. By way of answer to Paragraph 5 of said complaint, respondent admits that by its duly authorized agents and while engaged in the operation of the plant in the year 1937 and each factory year thereafter it offered to each of its employees, and did execute with each of approximately seventy-five per cent of its employees individually, em- [fol. 12] ployment contracts for the current factory year, and that Exhibit "A" to said complaint is a representative copy of said contract. Respondent denies that the offering and execution of said contracts was in order to abrogate, negate, and circumvent the right of said employees to form, join, or assist labor organizations, or to deprive its employees of the right to bargain collectively through representatives of their own choosing, or in any manner to interfere with, restrain and coerce its employees in the exercise of their right to negotiate with respondent with respect to wages, hours and other conditions of employment, or to obstruct, prevent and defeat any concerted activities among its employees for the purpose of collective bargaining or other mutual aid or protection, and respondent denies that said individual contracts are unenforceable and void as to respondent. Respondent also alleges that individual contracts between employer and employee are lawful and that the individual contracts so entered into by respondent and its employees were voluntarily entered into in good faith and the same are in all respects valid and enforceable both as to respondent and the employees, parties thereto.

3. By way of answer to paragraphs 6 and 7, respondent admits that on March 3, 1942, the National Labor Relations Board issued its certification in a representation proceeding as follows:

"It Is Hereby Certified, That International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, affiliated with the Congress of In-

dustrial Organizations, has been selected by a majority of all the production and maintenance employees, including Charles R. (Whitey) Clausen, Johnny Waters, Oliver Gordon, Walter Coghill, Frank DeFreeze, and Hank DeVooght, of J. I. Case Co., Rock Island, Illinois, plant exclusive of office and clerical employees and Paul Eastland, Russel Johnson, Loyd Cousin, and other supervisory employees, and pattern makers and pattern makers' apprentices, as their representative for the purposes of collective bargaining, and that, pursuant to the provisions of Section (a) of the National Labor Relations Act, Inter-[fol. 13] national Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O., is the exclusive representative of all such employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment."

Respondent further alleges that said bargaining unit as of February 13, 1942, the date of the election in the representation proceeding, was comprised of 582 employees, of which number 415 employees had individual employment contracts with the respondent, and that in the representation proceedings respondent introduced into the record the number of individual employment contracts and the term thereof. Respondent further alleges that on the election in said representation proceeding 352 employees voted in favor of said Union as their representative for collective bargaining and 190 employees signified their desire not to be represented by said Union for the purpose of collective bargaining, thus certain employees unknown to respondent have consistently evidenced their desire to maintain their individual contractual status with respondent as the same existed prior to the said representation proceeding.

4. By way of answer to Paragraph 8 of the complaint, respondent denies that while engaged in the operation of the Rock Island plant on or about March 7, 1942, or at any time thereafter, it refused to deal with the Union pursuant to the certification of the National Labor Relations Board above set forth, and alleges the fact to be that respondent agreed to deal with the Union as such representative except that respondent could not deal with said Union as to employees having individual contracts with respondent

covering the terms and conditions of their employment so long as said contracts are in effect, and that respondent has offered to deal with said Union on behalf of all employees on conditions of employment which do not affect its rights and obligations and the rights and obligations of its employees under the individual contracts, and has also offered to deal with said Union on all general matters pertaining to rates of pay, wages, hours of employment and other conditions of employment as to employees not having individual contracts with respondent. Respondent further [fol. 14] alleges that said Union refused to negotiate or deal on the basis above set forth.

5. By way of answer to Paragraph 9 of the complaint, respondent denies that it did engage in and is engaged in unfair labor practices within the meaning of Section 8, subdivision (5) of the Act.

6. By way of answer to Paragraph 10 of the complaint, respondent repeats and realleges its answer to Paragraphs 5 and 8 of the complaint, and denies that by entering into, maintaining and enforcing individual contracts with its employees, and also denies that by any statement made by it, respondent did interfere with, restrain and coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act; or that respondent by any act did engage in and is engaging in unfair labor practices within the meaning of Section 8, subdivision (1) and Section 2, subdivisions (6) and (7) of the Act.

7. By way of answer to paragraph 11 of the complaint, respondent repeats and realleges its denial of and answer to Paragraphs 5, 8 and 10 of the complaint, and denies that any act of respondent having a close, intimate and substantial relation to trade, traffic and commerce among the several states tended to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

8. By way of answer to Paragraph 12 of said complaint, respondent realleges and restates its answer to Paragraphs 5, 8 and 10 of the complaint, and denies that any act of respondent constitutes an unfair labor practice affecting commerce within the meaning of Section 8, subdivisions (1) and (5) and Section 2, subdivisions (6) and (7) of the Act.

Wherefore respondent demands that the amended complaint be dismissed.

Dated this 9th day of April, 1942.

J. I. Case Company, By L. E. Stahl, *Works Manager, Rock Island Works of J. I. Case Company, Respondent.* P. O. Address: 200 Seventh Street, Rock Island, Illinois.

* * * * * * *

[fol. 15] Clark M. Robertson, 640 Wells Building, 324 E. Wisconsin Ave., Milwaukee, Wisconsin. Ben T. Reidy, 311 Safety Building, Rock Island, Illinois, *Respondent's Attorneys.*

Duly sworn to by L. E. Stahl. Jurat omitted in printing.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. C-2180

In the Matter of J. I. Case Company and International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O.

Mr. Isaiah S. Dorfman and *Mr. William J. Isaacson*, for the Board.

Mr. Clark M. Robertson, of Milwaukee, Wis., and *Mr. Ben T. Reidy*, of Rock Island, Ill., for the respondent.

Mr. H. D. Burcham, of Rock Island, Ill., for the Union.

Mr. Marvin C. Wahl, of counsel to the Board.

DECISION AND ORDER

Statement of the Case

Upon an amended charge duly filed by International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O., herein called the Union, [fol. 16] the National Labor Relations Board, herein called the Board, by the Regional Director for the Thirteenth Region (Chicago, Illinois), issued its complaint and amended complaint on March 27 and April 13, 1942, respectively, against J. I. Case Company, herein called the respondent, alleging that the respondent had engaged in

and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint, together with notice of hearing thereon, and of the amended complaint were duly served upon the respondent and the Union.

With respect to the unfair labor practices, the amended complaint alleged in substance that the respondent, at its Rock Island, Illinois, plant (1) since March 7, 1942, has refused to bargain collectively with the Union for the employees in an appropriate unit, although the Union at all times since February 13, 1942, has been the exclusive representative of such employees; (2) since 1937, has offered each of its employees, and has executed with approximately 75 percent of its employees individually, employment contracts, which are unenforceable and void as to the respondent because they were tendered for the purpose of depriving its employees of their right to self-organization and collective bargaining through representatives of their own choosing; and (3) by the foregoing acts has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

On April 13, 1942, the respondent filed its answer to the amended complaint, admitting certain allegations respecting its business, but denying that it had engaged in unfair labor practices. On the same day, the respondent, the Union, and the Board entered into a stipulation agreeing upon a statement of facts to serve as the basis for our Decision and Order herein and expressly waiving further hearing, the issuance of an Intermediate Report or Proposed Findings of Fact, or other procedure before the Board. The stipulation provides as follows:

For the purpose of rendering unnecessary the taking of testimony in the above entitled matter,

It Is Hereby Stipulated and Agreed by and between J. I. [fol. 17] Case Company, hereinafter called respondent; International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, hereinafter called the Union; and Isaiah S. Dorfman, Regional Attorney, and William J. Isaacson, Attorney, for the Thirteenth Region of the National Labor Relations Board, that the following

statement of facts and exhibits attached hereto shall have the same force and effect as though witnesses had testified with respect thereto and said exhibits had been offered and received in formal hearing.

I

Upon charges and amended charges duly filed by the Union, the National Labor Relations Board, hereinafter called the Board, by the Regional Director for the Thirteenth Region, issued its complaint, dated March 27, 1942, and its amended complaint, dated April 9, 1942, against respondent, alleging that respondent had engaged and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, hereinafter called the Act. The complaint accompanied by notice of hearing, and the amended complaint were duly served upon respondent and the Union.

Respondent's answer dated April 6, 1942, and respondent's amended answer dated April 9, 1942, while admitting various of the allegations contained in the complaint denied that it had engaged or was engaging in unfair labor practices within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the Act. The answer and amended answer were duly served upon the Board and Union.

II

The parties hereto expressly waive further hearing, intermediate report, proposed findings of fact, and other and further procedure before and of the Board, provided that [fol. 18] the parties hereto may within ten (10) days after the execution of the Stipulation file briefs with the Board and ask leave of the Board to argue orally. This Stipulation and Agreed Statement of Facts, together with first amended charge, complaint and notice of hearing, amended complaint, answer, amended answer, and the transcript of the record and exhibits in *J. I. Case Co.* and *International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O.*, Case No. R-3394, as well as the Board's Decision and Direction of Election and Certification of Representatives therein, shall be filed with the Chief Trial Examiner in Washington, D. C., and shall constitute the entire record in this proceeding. Upon said

record the Board may make findings of fact, conclusions of law and issue a decision and order. In any proceedings instituted to enforce or review such Board order the record as herein described shall constitute the entire record.

III

Respondent, a Wisconsin corporation, having its principal place of business in Racine, Wisconsin, and operating several plants in Wisconsin, Iowa, and Illinois, is engaged in the manufacture and sale of farm implements and farm machinery. Respondent's plant at Rock Island, Illinois, hereinafter called the plant, is the only plant involved in the instant proceeding and was acquired and placed in operation during 1937. During the year 1941 respondent purchased raw materials and supplies valued at approximately $1,000,000, of which amount approximately 80 per cent was delivered from points outside the State of Illinois. During the same period, respondent sold finished products manufactured at the plant in an amount in excess of $2,000,000, of which amount approximately 80 per cent was shipped to points outside the State of Illinois. There are at the present time approximately 700 persons employed at the plant, 582 of whom are in the appropriate unit herein- [fol. 19] after referred to in Paragraph VI. Respondent admits that its operations as herein described occurred in commerce within the meaning of Section 2 (6) and (7) of the Act.

IV

The Union, affiliated with the Congress of Industrial Organizations, is a labor organization within the meaning of Section 2 (5) of the Act.

V

Respondent, by its duly authorized agents, while engaged in the operation of the plant from on or about November, 1937, and at various times thereafter, upon hiring employees or at the commencement of the factory year, offered to each and every one of its employees individually a contract, a representative copy of which is hereto attached as Exhibit "A"[1] and made a part hereof (respondent's

[1] The Exhibits which are referred to in the Stipulation are not set forth in full herein, but are referred to in our findings of fact, *infra*, wherever necessary or material.

current rules referred to therein and made a part thereof, is attached hereto and made a part hereof as Exhibit "B"), and executed said contracts with each of approximately 75 per centum of its employees individually. From time to time thereafter at the beginning of each factory year, certain of said contracts were renewed and certain new contracts entered into. The employees executing said contracts were not necessarily the same from time to time; certain employees executed said contracts who had not executed them during the preceding factory year and other employees who had previously executed contracts failed to renew them. The percentage of contracts in effect at all times remained approximately as herein set forth. The factory years runs currently from August 1, 1941 up to and including July 31, 1942. There are presently in full force and [fol. 20] effect 433 of such contracts between respondent and individual employees, 415 of which are with employees in the unit as described in Paragraph VI herein, which unit consists of 582 employees.

On December 17, 1941, February 5, 1942, and March 19, 1942, and on each of said dates, respondent mailed to each and all of its employees engaged at the plant a letter over the signature of T. E. Stahl, Works Manager, a copy of each of said letters being attached hereto, and made a part hereof, as Exhibits "C", "D", and "E", respectively.[2]

The Board contends, and respondent denies, that said individual contracts now in effect, and each of them, are

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[2] The letter of December 17 summarized the evidence and arguments which were presented at the hearing in the representation proceeding, including the respondent's contention that the individual contracts constituted a bar to the proceeding. In the letter of February 5, the respondent advised its employees that the Board had directed the holding of an election and that conferences had been held in preparation therefor and urged all eligible employees to vote. The letter of March 19 stated that the Union had won the election and had been certified by the Board, that the Union had presented the respondent with a collective bargaining agreement but the respondent refused to deal with the Union concerning the terms and conditions of employment covered by the individual contracts, and that the Union had filed charges with the Board.

illegal, unenforceable and void as to respondent, as set forth in Paragraphs 5 and 10 of the complaint in that:

(1) Each of said individual contracts, and particularly the employee covenants provided therein, preclude the employees, and each of them, from exercising their rights under the Act. Each of said contracts is, therefore, invalid on its face and unenforceable and void as to respondent;

(2) In addition to (1) herein and regardless whether said contracts are illegal *per se*, respondent actively utilized said contracts as a means of interfering with the self-organization of its employees and preventing collective bargaining by publicizing to its employees:

(a) That the contracts were a bar to the selection of a bargaining representatives under Section 9 (c) of the Act as set forth in Exhibit "C";

[fol. 21] (b) That the company would not bargain with their duly certified collective bargaining representative as exclusive representative, respecting wages, hours and working conditions during the term of said individual contracts as set forth in Exhibit "E".

For the purposes of this Stipulation, the Board does not contend that the execution of said contracts was a condition of employment, or that the status of individual employees was effected by reason of signing or failing to sign said contracts.

VI

The parties state that on January 26, 1942, the Board, rejecting respondent's contention therein raised that the contracts hereinabove referred to constitute a bar to a direction of election, issued its Decision and Direction of Election in Case No. R-3394, entitled *In the Matter of J. I. Case Co.* and *International Union, United Automobile, Aircraft and Implement Workers of America, C. I. O.* (38 N. L. R. B. 110), finding, among other things, that in order to insure to the employees of the plant the full benefit of their right to self organization and otherwise to effectuate the policies of the Act, "all production and maintenance employees, including Charles R. (Whitey) Clausen, Johnny Waters, Oliver Gordon, Walter Coghill, Frank De Freeze, and Hank De Vooght, of J. I. Case Co., Rock Island, Illinois, plant exclusive of office and clerical employees and Paul

Eastland, Russel Johnson, Loyd Cousin, and other supervisory employees, and pattern makers and pattern makers' apprentices" constitute a unit appropriate for the purposes of collective bargaining with respondent, within the meaning of Section 9 (b) of the Act, hereinafter called the unit. For the purposes of this Stipulation respondent does not contest the appropriateness of the unit.

[fol. 22]

VII

That on February 13, 1942, a majority of the employees in the unit designated the Union as its representative for the purpose of collective bargaining with respondent, such designation having been made pursuant to aforesaid Direction of Election in an election by secret ballot held on February 13, 1942, and at all times since February 13, 1942, the Union has been the exclusive representative of all employees in the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment or other conditions of employment.

VIII

On March 7, 1942, Mr. H. D. Burcham, duly authorized representative of the Union, in a meeting with Mr. T. E. Stahl, Works Manager of the Rock Island plant and duly authorized representative of respondent, did request respondent to bargain collectively with respect to rates of pay, wages, hours of employment and other conditions of employment with the Union as the exclusive representative of all the employees of respondent in the unit. In response thereto, Mr. Stahl did fail and refuse to negotiate with the Union as the exclusive representative of all the employees in the unit with respect to rates of pay, wages, hours of employment or other conditions of employment, declaring that respondent could not deal with the Union in any manner affecting the rights and obligations of respondent and its employees under the individual contracts while the contracts remained in full force and effect. Mr. Stahl continued that respondent would deal with the Union on matters which did not affect the rights of respondent and the employees under the individual contracts, and that it would deal with the Union as the exclusive bargaining agency for all employees in the unit on matters relating to hours, wages and conditions of employment upon expiration of the individual contracts.

[fol. 23] IX

At all times since March 7, 1942, up and including the making of this Stipulation and Agreed Statement of Facts, respondent has maintained the same position, as described in Paragraph VIII herein, with respect to the Union's request to bargain collectively.

The Board contends, and respondent denies, that respondent has refused to bargain collectively with the Union as the exclusive representative of its employees within the unit in violation of Section 8 (5) of the Act.

X

Anything to the contrary herein notwithstanding, the record in this matter may be reopened by the Board upon notice to the parties, provided should that occur, that the record will, upon request of any of the parties hereto, be reopened with respect to any or all issues herein.

XI

There is no oral understanding or agreement which varies, alters, or adds to this Stipulation and Agreed Statement of Facts.

On April 28, 1942, the respondent filed a brief which the Board has considered.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

The respondent, J. I. Case Company, is a Wisconsin corporation engaged in the manufacture and sale of farm implements and farm machinery. It operates plants in the States of Wisconsin, Iowa, and Illinois. The respondent's plant at Rock Island, Illinois, is involved in this proceeding. During 1941 the respondent, in connection with its [fol. 24] operations at Rock Island, purchased raw materials and supplies valued at approximately $1,000,000, of which amount 80 percent represented deliveries to Rock Island from points outside the State of Illinois. In the same period, the respondent sold finished products which were manufactured at its Rock Island plant in an amount exceed-

ing $2,000,000, of which 80 percent represented shipments to points outside the State of Illinois. At the time of the hearing, the respondent employed approximately 700 persons at its Rock Island plant. The respondent admits that it is engaged in commerce within the meaning of the Act.

II. The Organization Involved

International Union, United Automobile, Aircraft & Agricultural Implement Workers of America is a labor organization affiliated with the Congress of Industrial Organizations, admitting to membership employees of the respondent.

III. The Unfair Labor Practices

A. The Refusal to Bargain Collectively

1. The Appropriate Unit

The parties stipulated, and we find, that all production and maintenance employees, including Charles R. (Whitey) Clausen, Johnny Waters, Oliver Gordon, Walter Coghill, Frank De Freeze, and Hank De Vooght, and excluding office and clerical employees and Paul Eastland, Russel Johnson, Loyd Cousin, and other supervisory employees, and pattern makers and pattern makers' apprentices, constitute a unit appropriate for the purposes of collective bargaining and that such unit insures to employees of the respondent the full benefit of their right to self-organization and collective bargaining and otherwise effectuates the policies of the Act.[3]

[fol. 26] 2. Representation by the Union of a Majority in the Appropriate Unit

On February 13, 1942, in an election conducted by the Board pursuant to a Direction of Election,[4] a majority of

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[3] We previously found this unit to be appropriate in *Matter of J. I. Case Co.* and *International Union, United Automobile, Aircraft & Agricultural Implement Workers of America (C. I. O.)* 38 N. L. R. B. 522.

[4] *Idem.*

the employees in the appropriate unit designated the Union as their representative for the purposes of collective bargaining with the respondent with respect to rates of pay, wages, hours of employment, and other conditions of employment. On March 3, 1942, the Board certified the Union as such representative.[5] The parties stipulated, and we find, that at all times since February 13, 1942, the Union has been the exclusive representative of all the employees in the unit heretofore found appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment. There are 582 employees in the appropriate unit.

3. The Refusal to Bargain

In accordance with the stipulation of the parties, we find that on March 7, 1942, H. D. Burcham, a representative of the Union, requested T. E. Stahl, works manager of the Rock Island plant, to bargain collectively with the Union as exclusive representative of the respondent's employees in the appropriate unit. Stahl, however, refused to negotiate with the Union as such representative, stating that the respondent "could not deal with the Union in any manner affecting the rights and obligations of respondent and its employees under the individual contracts while the contracts remained in full force and effect." Stahl asserted that the respondent would deal with the Union on matters which did not affect the rights of the respondent and the employees under the individual contracts and that it would deal with the Union as the exclusive bargaining representative for all employees in the unit on matters relating to [fol. 26] hours, wages, and conditions of employment upon the expiration of the individual contracts.

4. The Individual Employment Contracts

In November 1937, and at various times thereafter, the respondent, upon hiring new employees and at the commencement of each factory year, offered to each employee an individual contract. The contracts in effect at the time

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[5] *Matter of J. I. Case Co.* and *International Union, United Automobile, Aircraft & Agricultural Implement Workers of America (C. I. O.)*, 39 N. L. R. B., No. 73.

of the alleged refusal to bargain were executed on August 1, 1941, or thereafter, for a period ending July 31, 1942. They, like their predecessors, contained the following provisions: The respondent agreed to pay a specified hourly rate or prevailing piece rates to the contracting employee and to maintain such rates for the term of the agreement, to determine new rates in the event that the contracting employee's job changed, to furnish employment as steadily as trade conditions permitted, and to comply with the respondent's rules;[6] the employee agreed to accept the wages, hours and working conditions provided for, to "faithfully and honestly" serve the respondent during the term of the agreement, to preserve the respondent's property, to comply with its rules, and to accept the respondent's "fixed" policy that "quality must be first," and that "defective work will not be paid for."

The respondent executed such contracts with approximately 75 percent of its employees. At the beginning of each factory year, some existing contracts were renewed, others were entered into for the first time, while some employees failed to renew contracts executed by them during the preceding factory year. As of April 13, 1942, 415 of the 582 employees in the appropriate unit had signed individual contracts.

As stated in the stipulation, it is not contended that the execution of the individual contracts was a condition of employment or that the status of individual employees was affected by reason of signing or failing to sign the contracts.

[fol. 27] In accordance with the stipulation of the parties, we find that on December 17, 1941, the day on which the hearing was held in the representation proceeding, and again on March 19, 1942, following its refusal to bargain with the Union concerning matters covered by the individual contracts, the respondent wrote its employees concerning its position with respect to such contracts. Thus, in its letter of December 17, it wrote:

* * * * * * *

[6] The rules referred to included the factory rules, safety rules, apprentice training, a vacation plan, and miscellaneous information.

The Company * * * showed to the Board that on the payroll of November 22, 1941, 433 of the employees had exercised their right to make individual contracts with the Company. * * *

Evidence was presented on this point and will be submitted to the Labor Board at Washington for a final determination as will also the Company's request that the proceeding be dismissed on the ground that the Company does not believe that any action should affect its right and the rights of its employees who have signed individual contracts and indicated that they wish to bargain with the Company on that basis.

* * * * * * *

The Company is giving you this information in accordance with its policy of keeping you informed as to matters which affect the employment relationship existing between you and the Company.

Material excerpts from the March 19 letter follow:

As we told you in our letter of December 17, 433 Case employees have exercised their right to make individual contracts with the Company. These contracts continue until August 1, 1942, and their validity is not affected by the result of the ballot. Accordingly, when the Committee of the Union came to see the Management of the Rock Island Plant, and presented a collective bargaining contract for all employees, they were advised that the Company could not deal with the Union in any manner which affected the rights and obligations of the Company and its employees under the individual contracts while these contracts were still in effect.

* * * * * * *

[fol. 28] The Union has advised the Company that it will not deal with the Company except on the basis of the contract which it presented. In other words, the Union has taken the position that the Company must tear up its contracts with its individual employees and disregard the rights and obligations of its employees and of itself under those agreements. The Company believes and has been advised that the contracts for their term constitute legal and binding obligations both on the part of the Company and on the part

of the employees, and that its individual employees have constitutional rights which they are entitled to have preserved and which the Company has no right to surrender.

* * * * * * *

5. Conclusions

The respondent contends that the individual contracts are valid and enforceable and preclude it from engaging in collective bargaining with the Union concerning the terms and conditions of employment which are covered by such contracts.[7]

The issue thus presented is whether, by voluntarily entering into individual contracts of employment prior to the designation of a collective bargaining agent, the employees are disabled during the term of such contracts from bargaining through representatives of their subsequent choosing with respect to terms and conditions of employment covered by the individual compacts. Correlatively, the question is whether the respondent, under the circumstances, is relieved of the duty to bargain collectively.

We must resolve the issue against the respondent, and we find its defense to be without merit. The Act expressly recognizes that the refusal of employers to accept the procedure of collective bargaining leads to industrial strife and unrest by perpetuating the inequality of bargaining power between employers and their employees "who do not [fol. 29] possess full freedom of association or actual liberty of contract." Aimed at removing that disparity of bargaining power and its consequent evils, the Act expressly declares that the public policy is to encourage the practice and procedure of collective bargaining and imposes upon employers the duty to bargain exclusively with the duly designated representatives of their employees. The duty is necessarily paramount to the freedom of contract which the employer may have enjoyed prior to the enactment of the statute or before the collective agent has been

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[7] In our Decision and Direction of Election (see footnote 3, *supra*) we overruled a similar contention of the respondent to the effect that the individual contracts with the employees constituted a bar to an election.

chosen. Until such representative is designated, the employer may, of course, deal individually with his employees concerning any aspect of the employment relationship so long as he does not exact terms repugnant to the Act [8] and does not offer the contracts for the purpose of infringing rights under the Act.[9] The employee is not, however, presumed thereby to have surrendered his right to collective bargaining during the period of his individual agreement. The right and its correlative duty are merely in abeyance pending the choice of a collective agent.[10] When once a majority of the employees have exercised their right to choose a representative for concerted bargaining in an appropriate unit, the employer's statutory obligation to deal exclusively with such representative as to all terms and conditions of employment is immediate and unconditional and its performance may not be deferred or qualified by reason of any individual bargain which he may have made with his employees.[11] Nor may the employer, contrary to the Board's determination, limit the bargaining unit to the non-contracting employees and thereby arrogate to himself a [fol. 30] power lodged exclusively in the Board. Any attempt by the employer to curtail the collective agent's power or to compel individual bargaining under the contracts constitutes an obstruction to the rights guaranteed by the Act. To hold otherwise, would be to violate the clear intendment of the Act and to discourage self-organization and collective bargaining.

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[8] *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350.

[9] *National Labor Relations Board* v. *Superior Tanning Co.*, 117 F. (2d) 881 (C. C. A. 7), cert. den., 313 U. S. 559.

[10] Even where an employee voluntarily signs an individual contract of employment, agreeing to bargain individually, the individual contract, to that extent, is void and unenforceable. See *National Labor Relations Board* v. *Stone*, 125 F. (2d) 752 (C. C. A. 7); *Matter of Killefer Manufacturing Corporation* and *Steel Workers Organizing Committee*, 22 N. L. R. B. 84.

[11] In *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 435, the Court said, "* * * existing laws [are] read into contracts in order to fix obligations as between the parties * * *."

Thus, the respondent, by insisting that those who signed contracts wish to bargain on an individual basis and by refusing to deal with the Union with respect to terms and conditions covered by the individual contracts, has failed to bargain collectively within the meaning of the Act.

Moreover, the respondent has utilized the contracts to interfere with and impede its employees in the exercise of their right to select representatives for collective bargaining and to bargain through such representatives by urging its employees, by means of the letters of December 17, 1941, and March 19, 1942, to bargain individually on the basis of the contracts rather than through a collective agent. The letters clearly were intended to advise the employees that continued support of the Union as collective bargaining agent would be of no avail, as the respondent would refuse to deal with such agent. The respondent's purpose in so circularizing its employees was thus to compel them to adhere to the individual contracts and to abandon their collective efforts and rights during the term of the contracts.

We find that the respondent on March 7, 1942, and at all times thereafter, has refused to bargain collectively with the Union as the exclusive representative of the employees in an appropriate unit and has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

We find also that, by urging its employees to bargain individually on the basis of the contracts, the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act.

[fol. 31] IV. The Effect of the Unfair Labor Practices upon Commerce

We find that the activities of the respondent set forth in Section III, above, occurring in connection with the operations of the respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

We have found that the respondent has interfered with, restrained, and coerced its employees in the exercise of the

rights guaranteed in Section 7 of the Act. We shall, therefore, order the respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

We have found that the respondent has failed to bargain with the Union. Consequently, we shall order it upon request to bargain collectively with the Union with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Since we have found that the respondent has utilized the individual contracts as a means of thwarting the rights of its employees under the Act, and since we consider such contracts to constitute an obstacle to the full exercise of the right to collective bargaining, we find it necessary, in order to effectuate the policies of the Act, to order the respondent to refrain from enforcing the contracts. We shall consequently direct the respondent to give to each employee who has signed such contract written notice stating: (1) that the contracts will not in any manner be enforced or attempted to be enforced; (2) that the employees are not required or expected by virtue of such contracts to deal with the respondent individually; and (3) that such discontinuance of the contracts is without prejudice to the assertion of any legal rights the employees may have ac- [fol. 32] quired under such contracts. We shall further order the respondent to post notices to the same effect in appropriate places in its Rock Island plant.

Upon the basis of the above findings of fact and upon the entire record in the case, the Board makes the following:

Conclusions of Law

1. International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O., is a labor organization within the meaning of Section 2 (5) of the Act.

2. All production and maintenance employees, including Charles R. (Whitey) Clausen, Johnny Waters, Oliver Gordon, Walter Coghill, Frank De Freeze, and Hank De Vooght, and excluding office and clerical employees and Paul Eastland, Russel Johnson, Loyd Cousin, and other supervisory employees, and pattern makers and pattern makers' apprentices, constitute a unit appropriate for the

purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

3. Since February 13, 1942, and at all times thereafter, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O., has been the exclusive representative of all such employees for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. By refusing to bargain collectively with International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O., as the exclusive representative of its employees within an appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor [fol. 33] practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Order

Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, J. I. Case Company, Rock Island, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Giving effect to the individual contracts of employment or any modification, continuation, extension, or renewal thereof, or entering into any similar form of contract with its employees for any period subsequent to the date of this Decision;

(b) Refusing to bargain collectively with International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O., as exclusive representative of all production and maintenance employees at its

Rock Island, Illinois, plant, including Charles R. (Whitey) Clausen, Johnny Waters, Oliver Gordon, Walter Coghill, Frank De Freeze, and Hank De Vooght, and excluding office and clerical employees and Paul Eastland, Russel Johnson, Loyd Cousin, and other supervisory employees, and pattern makers and pattern makers' apprentices, in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment;

(c) In any manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Give separate written notice to each of its employees [fol. 34] who signed an individual contract of employment or any modification, continuation, extension, or renewal thereof, or any similar form of contract for any period subsequent to the date of this Decision, that such contract will not in any manner be enforced or attempted to be enforced, that the employee is not required or expected by virtue of such contract to deal with the respondent individually, and that such discontinuance of the contract is without prejudice to the assertion of any legal rights the employee may have acquired under such contract;

(b) Upon request, bargain collectively, with International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O., as the exclusive representative of all its production and maintenance employees, including Charles R. (Whitey) Clausen, Johnny Waters, Oliver Gordon, Walter Coghill, Frank De Freeze, and Hank De Vooght, and excluding office and clerical employees and Paul Eastland, Russel Johnson, Loyd Cousin, and other supervisory employees, and pattern makers and pattern makers' apprentices, in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment;

(c) Post immediately in conspicuous places throughout its Rock Island, Illinois, plant and maintain for a period of

at least sixty (60) consecutive days from the date of posting, notices stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a), (b), and (c) hereof, and (2) that the respondent will take the affirmative action set forth in paragraphs 2 (a) and (b) hereof;

(d) Notify the Regional Director for the Thirteenth Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

Signed at Washington, D. C., this — day of July 1942.
Henry A. Millis, Chairman; Wm. M. Leiserson, Member, National Labor Relations Board. (Seal.)

[fol. 35] Mr. Gerard D. Reilly concurring:

I concur in finding that the refusal of the respondent to bargain with the Union certified pursuant to Section 9 (c) as the collective bargaining agent for all the employees within the appropriate unit on matters covered by the individual contracts amounted to a violation of Section 8 (5) of the Act.

The position of the Company is that since these individual contracts have fixed certain provisions with respect to wages, hours, and working conditions of employment for a term of 1 year, the employees are disabled during the term of these contracts from bargaining through a collective agent for changes in these matters. In other words, we are urged to hold that inasmuch as the individual agreements contained no provisions which contravened the provisions of this Act of any other statute, the employees in question were bound by these conditions until the expiration date and were not relieved from their obligations by the designation of a statutory collective bargaining agent.

The question thus posed is a difficult one. It raises a problem of a possible conflict between the law of contracts and rights arising under the National Labor Relations Act. In my opinion, this record does not require the Board to pass upon it.

The case is before us on a stipulation of agreed facts. These individual contracts were incorporated by reference

in the stipulation and the Board should consider their legal effect. It seems to me clear from examining these instruments that, despite the fact that on their face they purport to be in effect for a fixed period, they are lacking in the elements of mutuality necessary for contracts of employment enforceable for a definite term.[12] These contracts afford the employees no greater security of tenure than they would enjoy under an employment relationship terminable [fol. 36] at will. Hence, it follows that an employee himself at any time, could negotiate for a change in wages, hours, and working conditions specified in these instruments. Therefore, under the provisions of the National Labor Relations Act, an employee could designate a collective bargaining agent to conduct these negotiations and the employer would be obligated to bargain with him. That is what happended in this case, but the employer did not fulfill his obligation.

I think it is sufficient to rest our judgment upon this ground without passing upon the abstract question of law raised by the respondent.

Signed at Washington, D. C., this — day of July 1942.

Gerard D. Reilly, Member, National Labor Relations Board.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

[Title omitted]

STIPULATION AND AGREED STATEMENT OF FACTS

For the purpose of rendering unnecessary the taking of testimony in the above entitled matter,

It Is Hereby Stipulated and Agreed by and between J. I. Case and Company, hereinafter called respondent; Inter-

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[12] Thus, while exacting a promise from the employee to work for a period of 1 year, the employer agrees only to furnish employment "as steadily as business and trade conditions permit." (Clause 2 of the Company agreement.) Moreover, the employer reserves the right unilaterally to effect material changes in manufacturing methods and to determine the rate of pay for any "new job" which might result in consequence of such changes. (Clause 3 of the Company agreement.)

national Union, United Automobile, Aircraft & Agricultural Implement Workers of America, affiliated with the [fol. 37] Congress of Industrial Organizations, hereinafter called the Union; and Isaiah S. Dorfman, Regional Attorney, and William J. Isaacson, Attorney, for the Thirteenth Region of the National Labor Relations Board, that the following statement of facts and exhibits attached hereto shall have the same force and effect as though witnesses had testified with respect thereto and said exhibits had been offered and received in formal hearing.

I

Upon charges and amended charges duly filed by the Union, the National Labor Relations Board, hereinafter called the Board, by the Regional Director for the Thirteenth Region, issued its complaint, dated March 27, 1942, and its amended complaint, dated April 9, 1942, against respondent, alleging that respondent had engaged and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, hereinafter called the Act. The complaint accompanied by notice of hearing, and the amended complaint were duly served upon respondent and the Union.

Respondent's answer dated April 6, 1942, and respondent's amended answer dated April 9, 1942, while admitting various of the allegations contained in the complaint denied that it had engaged or was engaging in unfair labor practices within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the Act. The answer and amended answer were duly served upon the Board and Union.

II

The parties hereto expressly waive further hearing, intermediate report, proposed findings of fact, and other and further procedure before and of the Board, provided that the parties hereto may within ten (10) days after the execution of this Stipulation file briefs with the Board and ask leave of the Board to argue orally. This Stipulation and Agreed Statement of Facts, together with first [fol. 38] amended charge, complaint and notice of hearing, amended complaint, answer, amended answer, and the transcript of the record and exhibits in *J. I. Case Co.* and *Interna-*

tional Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O., Case No. R-3394, as well as the Board's Decision and Direction of Election and Certification of Representatives therein, shall be filed with the Chief Trial Examiner in Washington, D. C., and shall constitute the entire record in this proceeding. Upon said record the Board may make findings of fact, conclusions of law and issue a decision and order. In any proceedings instituted to enforce or review such Board order the record as herein described shall constitute the entire record.

III

Respondent, a Wisconsin corporation, having its principal place of business in Racine, Wisconsin, and operating several plants in Wisconsin, Iowa, and Illinois, is engaged in the manufacture and sale of farm implements and farm machinery. Respondent's plant at Rock Island, Illinois, hereinafter called the plant, is the only plant involved in the instant proceeding and was acquired and placed in operation during 1937. During the year 1941 respondent purchased raw materials and supplies valued at approximately $1,000,000, of which amount approximately 80 per cent was delivered from points outside the State of Illinois. During the same period, respondent sold finished products manufactured at the plant in an amount in excess of $2,000,000, of which amount approximately 80 per cent was shipped to points outside the State of Illinois. There are at the present time approximately 700 persons employed at the plant, 582 of whom are in the appropriate unit hereinafter referred to in Paragraph VI. Respondent admits that its operations as herein described occurred in commerce within the meaning of Section 2 (6) and (7) of the Act.

[fol. 39]

IV

The Union, affiliated with the Congress of Industrial Organization, is a labor organization within the meaning of Section 2 (5) of the Act.

V

Respondent, by its duly authorized agents, while engaged in the operation of the plant from on or about November, 1937, and at various times thereafter, upon hiring em-

ployees or at the commencement of the factory year, offered to each and every one of its employees individually a contract, a representative copy of which is hereto attached as Exhibit "A" and made a part hereof (respondent's current rules referred to therein and made a part thereof, is attached hereto and made a part hereof as Exhibit "B"), and executed said contracts with each of approximately 75 per centum of its employees individually. From time to time thereafter at the beginning of each factory year, certain of said contracts were renewed and certain new contracts entered into. The employees executing said contracts were not necessarily the same from time to time; certain employees executed said contracts who had not executed them during the preceding factory year and other employees who had previously executed contracts failed to renew them. The percentage of contracts in effect at all times remained approximately as herein set forth. The factory year runs currently from August 1, 1941 up to and including July 31, 1942. There are presently in full force and effect 433 of such contracts between respondent and individual employees, 415 of which are with employees in the unit as described in Paragraph VI herein, which unit consists of 582 employees.

On December 17, 1941, February 5, 1942, and March 19, 1942, and on each of said dates, respondent mailed to each and all of its employees engaged at the plant a letter over the signature of T. E. Stahl, Works Manager, a copy of each of said letters being attached hereto, and made [fol. 40] a part hereof, as Exhibit "B", "C" and "D", respectively.

The Board contends, and respondent denies, that said individual contracts now in effect, and each of them, are illegal, unenforceable and void as to respondent, as set forth in Paragraph 5 and 10 of the complaint in that:

(1) Each of said individual contracts, and particularly the employee covenants provided therein, preclude the employees, and each of them, from exercising their rights under the Act. Each of said contracts is, therefore, invalid on its face and unenforceable and void as to respondent;

(2) In addition to (1) herein and regardless whether said contracts are illegal *per se*, respondent actively uti-

lized said contracts as a means of interfering with the self organization of its employees and preventing collective bargaining by publicizing to its employees:

(a) That the contracts were a bar to the selection of a bargaining representative under Section 9(c) of the Act as set forth in Exhibit "C";

(b) That the company would not bargain with their duly certified collective bargaining representative as exclusive representative, respecting wages, hours and working conditions during the term of said individual contracts as set forth in Exhibit "E".

For the purposes of this Stipulation, the Board does not contend that the execution of said contracts was a condition of employment, or that the status of individual employees was affected by reason of signing or failing to sign said contracts.

VI

The parties state that on January 26, 1942, the Board, rejecting respondent's contention therein raised that the contracts hereinabove referred to constitute a bar to a direction of election, issued its Decision and Direction of Election in Case No. R-3394, entitled *In the Matter of J. I. Case Co.* and *International Union, United Automobile Aircraft and Implement Workers of America, C. I. O.* (38 [fol. 41] N. L. R. B. 110), finding, among other things, that in order to insure to the employees of the plant the full benefit of their right to self organization and otherwise to effectuate the policies of the Act, "all production and maintenance employees, including Charles R. (Whitey) Clausen, Johnny Waters, Oliver Gordon, Walter Coghill, Frank De Freeze, and Hank De Vooght, of J. I. Case Co., Rock Island, Illinois, plant exclusive of office and clerical employees and Paul Eastland, Russel Johnson, Loyd Cousin, and other supervisory employees, and pattern makers and pattern makers' apprentices" constitute a unit appropriate for the purposes of collective bargaining with respondent, within the meaning of Section 9 (b) of the Act, hereinafter called the unit. For the purposes of this Stipulation respondent does not contest the appropriateness of the unit.

VII

That on February 13, 1942, a majority of the employees in the unit designated the Union as its representative for the purpose of collective bargaining with respondent, such designation having been made pursuant to aforesaid Direction of Election in an election by secret ballot held on February 13, 1942, and at all times since February 13, 1942, the Union has been the exclusive representative of all employees in the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment or other conditions of employment.

VIII

On March 7, 1942, Mr. H. D. Burcham, duly authorized representative of the Union, in a meeting with Mr. T. E. Stahl, Works Manager the Rock Island plant and duly authorized representative of respondent, did request respondent to bargain collectively with respect to rates of pay, wages, hours of employment and other conditions of employment with the Union as the exclusive representative of all the employees of respondent in the unit. In [fol. 42] response thereto, Mr. Stahl did fail and refuse to negotiate with the Union as the exclusive representative of all the employees in the unit with respect to rates of pay, wages, hour- of employment or other conditions of employment, declaring that respondent could not deal with the Union in any manner affecting the rights and obligations of respondent and its employees under the individual contracts while the contracts remained in full force and effect. Mr. Stahl continued that respondent would deal with the Union on matters which did not affect the rights of respondent and the employees under the individual contracts, and that it would deal with the Union as the exclusive bargaining agency for all employees in the unit on matters relating to hours, wages and conditions of employment upon expiration of the individual contracts.

IX

At all times since March 7, 1942, up — and including the making of this Stipulation and Agreed Statement of Facts, respondent has maintained the same position, as described

in Paragraph VIII herein, with respect to the Union's request to bargain collectively.

The Board contends, and respondent denies, that respondent has refused to bargain collectively with the Union as the exclusive representative of its employees within the unit in violation of Section 8 (5) of the Act.

X

Anything to the contrary herein notwithstanding, the record in this matter may be reopened by the Board upon notice to the parties, provided, should that occur, that the record will, upon request of any of the parties hereto, be reopened with respect to any or all issues herein.

[fol. 43]

XI

There is no oral understanding or agreement which varies, alters or adds to this Stipulation and Agreed Statement of Facts.

Dated at Chicago, Illinois, this 13th day of April, 1942.

J. I. Case Company, By Clark M. Robertson, Clark M. Robertson, Counsel; S. T. Reid, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O., By H. D. Burcham, International Representative, by Isaiah S. Dorfman, Regional Attorney, National Labor Relations Board, 13th Region, by William J. Isaacson, Attorney, National Labor Relations Board, 13th Region.

[fol. 44] EXHIBIT "A" TO STIPULATION OF FACTS

Form F-928-R. I. 2000 7-41

To maintain the operation of this factory and to establish mutually satisfactory employment relations, the following agreement is voluntarily entered into for the factory year August 1, 1941-July 31, 1942 between

J. I. Case Company
Rock Island Works, and
—— —— Employee

(Filed with Chief Trial Examiner, Apr. 16, 1942.)

During the term of this agreement 10¢ per hour will be paid over and above the rates shown.
The Company Agrees:

1. To pay not less than the rate of — cents per hour of work by Employee as —— and not less than — cents per hour when employed otherwise because of lack of regular employment, or the piece rates prevailing for jobs to which employee is assigned.

2. To furnish employment as steadily as business and trade conditions permit.

3. To maintain the rate of wages per hour or the piece work prices during the life of this agreement. A material change in manufacturing methods or equipment for any job or piece, as heretofore, will be treated as a new job and prices determined accordingly.

4. To maintain an emergency hospital and a panel of doctors for call.

5. To comply with the rules of the Company contained in Company's current rule book and as posted in the shop.

J. I. Case Company, Per —— ——.

The Employee Agrees:

1. To faithfully and honestly serve the Company during the operating periods from August 1, 1941 to July 31, 1942, [fol. 45] unless prevented by sickness or desiring to take a position elsewhere.

2. To accept the wages, hours and working conditions agreed to herein.

3. To preserve and care for the property of the Company.

4. To comply with the rules of the Company contained in the Company's current rule book, receipt of copy which is hereby acknowledged, and as posted in the shop.

Signed —— ——, Employee.

Date —. Check—. Address—.

—— ——.

Quality Agreement

In accepting employment with J. I. Case Company I agree to the following fixed policy:

(A) Quality must be first; piece work prices provide for good work.

(B) Defective work will not be paid for; employees using materials or parts clearly defective from some previous operation, will be held responsible for loss of their time spent on such material or parts.

(C) To cooperate to the best of my ability to uphold the Company policy of "Quality Products."

——, *Employee.*

[fol. 46] EXHIBIT B TO STIPULATION OF FACTS

(Filed with Chief Trial Examiner Apr. 16, 1942.)

Hand-Book for Factory Employees

(Cut)

J. I. Case Company, Rock Island, Illinois

- Employment Methods
- Factory Rules
- Safety Rules
- Apprentice Training
- Vacation Plan
- General Information

Form F-1211 1500 242

Greetings

To all present employees of the J. I. Case Company, to all those previously employed, whom we may be able to recall to work, and to any who may become new employees of the Company, the Management extends its greetings and best wishes. May our relationship be such that we may all profit therefrom, and be justly proud.

Such a satisfactory relationship can only result when there is present in spirit and practice a mutual understanding of the rights of the individual and of his Management, and when both cooperate to meet, so far as practicable, the needs and desires of the other.

The continued success of the business is the one most necessary thing in making possible the development of such a relationship.

The success of the business will depend entirely on the acceptance of the things we make by our potential customer. His acceptance will depend on the price he must pay for [fol. 47] our products, the service they will render in use, and our ability to supply them when he wants them.

The rules set up in the following pages are only such as your management deem necessary to a proper conduct of the business, and to make your work safer and more secure and pleasant.

Your full and complete understanding and observance of them is solicited. Your cooperation is needed. The cooperation of your management is assured.

Employment

Industry and Business are largely dependent for successful operation on the interest, ability and cooperation of the available help in the community where they are located. The prosperity and improvement of any community, in turn, depends on the success of its local industrial and business institutions and their ability to furnish regular employment at good wages.

It has been, and will continue to be a policy of the J. I. Case Company to give preference to residents of the local community, so far as possible, when hiring help.

During periods of abnormal activity or when a shortage of skilled help occurs, or when technical experience or training not available locally is needed it may be necessary to secure help outside.

A centrally located Employment Department does all the hiring for the works. This department is open to anyone wishing to apply for work during all the regular operating hours of the works.

Every applicant is given courteous attention and if he desires to do so may fill out and file a formal application for work. No applicant is ever hired at the time of his first appearance at the Employment Office or on the filing of his application. Time must be taken to check references and previous employment record.

Any applicant who can be placed will be notified at his home and called to the Employment Office.

When an applicant whose services can be used applies at the Employment Office the Employment Manager ex- [fol. 48] plains to him the job, the wages on that job and

other conditions of his employment. If these are satisfactory he is handed a copy of the "Hand-book for Factory Employees" and sent to the Company Doctor for a physical examination. He is asked to read our rules and return to the Employment Office following his examination.

Physical examinations are required so that we may avoid putting anyone at work for which he is not physically fitted or which might be detrimental to his health. To protect those already employed by preventing hazards from communicable diseases, and to provide a record of health condition at time of employment as a protection to the employee and the Company.

When the applicant returns to the Employment Department, having passed his physical examination, he is questioned by the Employment Manager to determine whether he has read "Factory Rules" and "Safety Rules" as contained in the "Hand-book for Factory Employees" and understands them. He is then definitely hired, asked to sign the following Safety Pledge Card and presents this Pledge to his foreman when reporting for work.

Safety Pledge

Mr. —— ——.

I have carefully read the Safety Rules of the J. I. Case Company.

I believe they are fair.

I will observe them at all times to the best of my ability.

I further pledge that during the period of my employment here I will cooperate with you, with the Safety Committee, and with my fellow workers to make this a safe place to work.

—— ——. Name.

Clock No. —.

Date —— —, ——.

[fol. 49] Probationary Period.

Every new employee understands that his first thirty days on the job constitutes a trial or probationary period during which his employment may be terminated at any time.

New men cannot always be placed at the kind of work for which they are best fitted within this period, but the foreman should determine within this period whether the

new employee has the necessary qualifications and willingness to work to warrant retention past the probationary period.

Factory Rules

The following rules are issued by this Company for the guidance of its employees. Experience has taught us the necessity for certain regulations in order to maintain a satisfactory working organization. Our desire is that all relations with you be based on fair treatment. With these thoughts in mind, these rules were formulated. Acceptance of employment with this Company constitutes acceptance of these rules.

1. Employees will be furnished identification badges to be worn in a conspicuous manner upon their outer clothing at all times while entering and on the Plant property. A charge of $.50 will be made for lost badges.

2. Working hours will be announced by appropriate notices on Company bulletin boards or by the foreman. These hours are governed by the business available and the conventional hours of work. Employees shall not enter the plant more than thirty minutes prior to their scheduled starting time.

3. Starting and quitting time will be designated by a signal; every employee must start and stop his work by such signal and at no other time.

4. Every employee must, in person, register his own "time in" and "time out" on the clock provided. If [fol. 50] one employee registers for another, this is considered a basis for dismissal.

5. Employees shall not visit departments in the Plant other than those in which they are employed, except upon Company business, unless authorized to do so by their Department Head.

6. In case of sickness or emergency, which prevents your reporting to work at the usual time, 'phone your foreman or the Employment Office as early as possible. Employees injured outside of the plant and requiring the service of a physician will be required to furnish a medical statement of fitness to return to duty before returning to work. Em-

ployees absent because of sickness or exposure to a contagious disease must furnish the Employment Department with a physician's statement on their fitness to resume employment before reinstatement.

7. Employees terminating their work with the Company will not be paid until three days after such termination unless they have given their foreman three days' notice.

8. All employees must have tool-crib clearance tickets before receiving final pay-off.

9. Employees terminating their work with the Company or discharged shall report at the Employment Department before receiving final pay-off.

10. The Pay Roll Department will make pay-offs each working day between 10:00 a. m. and 11:00 a. m., and 3:00 p. m. and 4:00 p. m. at the Paymaster's office.

11. Factory employees will be paid weekly on Friday for work done the previous week. In case of holidays falling on Friday, payment will be made on Thursday.

12. Smoking is not permitted except in such places and at such times as are designated by local regulations.

13. For the protection of Case employees who are gathered together for the purpose of earning their living, [fol. 51] there shall be no soliciting of memberships, pledges, subscriptions, collecting of money, circulating petitions, or conducting other than Company business, on Company property at any time (with one exception, that to be the Community Chest which is an annual community charity activity.

14. Abusive, or threatening language toward fellow employees, fighting, or threatening bodily injury to other employees is a basis for dismissal.

15. Removal by an employee of Company property from the premises is a basis for dismissal.

16. The Employment Department or your timekeeper should be notified of any change in home address.

17. Wilful disobedience of an order or an instruction given to an employee relative to his work by a Foreman or

other supervising office is not permitted, and is a basis for dismissal.

18. Working while in any degree under the influence of intoxicants is not permitted and is a basis for dismissal.

19. Except in cases of emergency, master switches or controls for machinery are to be operated only by the foreman or by individuals designated by the foreman.

20. From time to time it may be necessary to add, amend, or change the general rules or special rules as published. When such additions, amendments, or changes are made, a notice to this effect will be posted on the Company's bulletin boards.

Mutual cooperation will make your work more pleasant and profitable to you and the Company. We pledge ours and solicit yours.

Do not let personal affairs or problems interfere with a proper performance of your work.

Avoid garnishees or wage assignments. Plan to save part of your earnings; the thrift habit is a good one.

[fol. 52] Safety Rules of the J. I. Case Company

It is the purpose of this Company to make your working conditions as safe as may be possible.

To this end it has guarded or stands ready to guard or correct any hazardous condition. To provide safe equipment and to cooperate with you in making your work here safe.

We will need your cooperation. Each foreman will act as chairman of the Safety Committee for his department. Workers will serve on rotating commitees, to promote Safety and to maintain interest in Safe Operation. When you are asked for such service it is hoped that you will serve willingly and cooperate fully. It is a program for the best interest of all of us.

Safety Pays

Only necessary rules, and rules that may be enforced without injustice are part of our safety code.

For your personal protection the following general rules are mandatory. Additional rules pertaining to your individual work or department may be posted for your further protection.

Failure to observe published safety rules may be cause for dismissal.

Treatment of Injuries

All injuries, however slight, must be treated at the works hospital at once.

Proper treatment, promptly rendered, prevents complications.

We want a record of every accident. If we correct conditions causing minor accidents we will eliminate major accidents.

[fol. 53]

Machinery

Stop all machinery before cleaning, oiling, adjusting or repairing.

Use belt shifter when shifting belts.

Safety guards must be in place before any machine is operated.

Punch press operators must not put hands under dies; use hooks, tongs or tweezers.

When changing dies on presses turn off power and use safety lock.

Do not operate emery wheels that do not run true or on which rest is not properly adjusted.

Tools and Equipment

Do not use mushroomed chisels, punches, hammers or other hand tools.

Do not use loose or worn wrenches that slip under pressure.

Do not use unsafe ladders, or ladders with dull or rounded safety spikes.

Handling Material

Falling objects cause many accidents.

Do not leave tools, material or parts on overhead beams or ledges.

Do not pile or stand material on floor or bench in such manner that it may fall or be knocked over.

Do not load trucks in such manner that material may fall off during loading, transporting or unloading.

Electrical Repairs

Report all trouble on electrical equipment to your foreman. Only members of the electricians crew shall make electrical repairs.

Safety Clothing

Safety clothing or devices must be used where required by rules.

Goggles must be worn by grinders, welders, metal pourers, chippers, furnace operators, concrete breakers, and generally, where there are flying particles from work. [fol. 54] Your foreman will provide the right type for your work.

Respirators must be worn where dust, smoke or paint spray conditions exist.

Safety shoes should be worn by all men handling material —they must be worn on jobs indicated by your foreman or safety committee.

The Congress type of Safety Shoes are required in the Foundry. Lace shoes or low shoes are not to be worn in the Foundry. In other departments where falling hazards exist safety shoes are to be worn. At no time should badly worn or thin soled shoes be used.

Loose clothing must not be worn when working around revolving shafting or machinery.

Mental Attitude

Keep your mind on your work.

Think before you act.

Check your worries and outside interests and plans at the gate.

Do not engage in horseplay, scuffling, running in aisles or entry ways.

Be safe yourself, help make the plants safe for your fellow workers.

Cooperate fully in the Safety Program and the Work of your Safety Committee.

Keep Your Safety Pledge

Apprentice Training

Self preservation and continuity as an industrial nation require that apprentice training be encouraged. Specialization will produce satisfactory production men, but will not produce the all around mechanics and foundry-men needed in our shops. We should, therefore, assume our share of the responsibility of industry and maintain an apprenticeship system that will turn out a certain number of finished mechanics each year.

In keeping with the above statement of policy which is [fol. 55] incorporated in the Case Labor Policy, apprentice training is regularly provided for tool-makers, pattern-makers, machinists and moulders.

Careful selection is made before applicants are accepted for apprentice training; all apprentices must have completed high-school with satisfactory grades and have received training in the type of work for which he seeks apprenticeship. Apprentices indentured are signed to apprentice contracts complying with the laws of the state and the rules of the state; definite agreement in the contract provides for liberal compensation, periodically increased, and for issuing of a diploma and payment of a bonus for completion of their course. During the course of training careful and individual attention in the shop guarantees complete and satisfactory coverage of work necessary to a proper training and time spent in Vocational School in the study of related subjects rounds out a complete training.

Vacation Plan

This Plan was adopted to provide annual vacations in recognition of faithful, efficient and continuous service and regular attendance at work. We suggest that the time granted be devoted to rest, recreation and healthful enjoyment which tend to improve the health, interest and efficiency of those participating.

A complete explanation of the Plan is published and is available to all employees.

Compensation for Factory Accidents

The J. I. Case Company operates as a self-insured risk under the State Law and the supervision of the Industrial Commission.

Every effort is made not only to comply with the Law and the rules of the Commission but to provide for the most prompt and best medical care for all injuries happening in the plant.

A hospital with trained nurse and a part time physician is provided at the plant. Every injured employee is offered [fol. 56] the opportunity of selecting a physician from a panel of representative doctors in the city.

Compensation for lost time and disability due to factory accidents is paid promptly and in full accord with the rules of the Commission.

Good Will

The Management of the J. I. Case Company sincerely hopes that all of its employees find pleasure in their work and success and happiness in life.

Our continued success as a company is largely dependent on having our people find these things here. Only intelligent, interested workers can produce the kind of product we must have if the Company is to maintain and improve its position in the industry. Only those who find pleasure in their work and success and happiness in life can have this interest in the things they are doing.

The Management of this Company pledges its best efforts to make this such a place to work that you may find these things while working here.

J. I. Case Company.

Racine, Wisconsin.

EXHIBIT C TO STIPULATION OF FACTS

(Filed with Chief Trial Examiner, Apr. 16, 1942)

J. I. Case Company

A Full Line of Farm Machinery

General Office, Racine, Wis.

Rock Island Works — Rock Island, Illinois
200 Seventh St.

December 17, 1941.

To all Employees of Rock Island Works J. I. Case Company,

You will remember that in the Fall of 1940, the Farm Equipment Workers Organizing Committee, C. I. O., started [fol. 57] proceedings before the National Labor Relations Board seeking to establish themselves as the representative of employees of the Rock Island Plant for the purpose of collective bargaining. As a result of that petition an election was ordered at the Rock Island Plant and the election was held on November 28, 1940 and resulted in the employees of the J. I. Case Company by their free choice and ballot, rejecting the Union as their bargaining representative.

There has now been filed with the National Labor Relations Board a new petition by International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, C. I. O., whereby that organization seeks to be designated by the National Labor Relations Board as the only bargaining representative for all production and maintenance employees of the Rock Island Plant excluding Office, Clerical and Supervisory employees and also excluding Pattern Makers and Pattern Makers Apprentices and Watchmen.

In accordance with the Labor Board procedure, a hearing on this petition was held before the National Labor Relations Board in the Post Office Building at Rock Island on Wednesday, December 17, 1941. Both the Company and the Union were represented at the hearing.

The Labor Board filed a statement by the Regional Director of the Labor Board stating that he had been furnished with 225 membership cards in the Union purportedly

signed by employees of the Rock Island Plant. These cards were dated in the following months:

March, 1941	34 Cards
April, 1941	45 Cards
May, 1941	38 Cards
June, 1941	2 Cards
July, 1941	5 Cards
August, 1941	24 Cards
September, 1941	6 Cards
Undated	71 Cards

Of the foregoing total of 225 cards, he stated 219 appeared to be genuine membership cards. The certificate further [fol. 58] stated that these cards had been checked against the Company's payroll of November 22, 1941 and that 181 of the names on the cards were found on the Company's payroll which consisted of approximately 623 hourly paid employees. In other words, the cards evidenced a membership on November 22, 1941 of 181 out of 623 employees on the payroll.

The Company asked that the petition be denied in view of the fact that the union did not represent a majority or even a substantial number of the Case employees involved and furthermore showed to the Board that on the payroll of November 22, 1941, 433 of the employees had exercised their right to make individual contracts with the Company.

The classification of employees as to the bargaining unit in the event an election is ordered by the Board was not questioned although there were some individual employees whom the Union sought to exclude whom the Company thought should be included and the men afforded the right to vote in the event an election should be ordered. Evidence was presented on this point and will be submitted to the Labor Board at Washington for a final determination as will also the Company's request that the proceeding be dismissed on the ground that the Company does not believe that any action should affect its rights and the rights of its employees who have signed individual contracts and indicated that they wish to bargain with the Company on that basis.

The Company does not know how the Labor Board will decide these questions but if it decides that there is a ques-

tion of representation, all production and maintenance employees, excluding Office, Clerical and Supervisory employees and also excluding Pattern Makers and Pattern Makers Apprentices and Watchmen will be entitled to vote by secret ballot as to whether they desire to be represented by the Union for the purpose of bargaining or whether they do not wish to be so represented.

The Company is giving you this information in accordance with its policy of keeping you informed as to matters which affect the employment relationship existing between you and the Company.

Yours truly, J. I. Case Company, Rock Island Works,
/s/ L. E. Stahl, *Works Manager.*

Factories—Racine, Wis.—Rockford, Ill.—Rock Island, Ill.
Burlington, Ia.

[fol. 58a] EXHIBIT D TO STIPULATION OF FACTS

(Letterhead of J. I. Case Company, Rock Island, Illinois)

February 5, 1942.

To all Employees of the Rock Island Works of J. I. Case Company:

On December 17 we wrote you about the hearing held in the Post Office Building before the National Labor Relations Board. As we told you, this hearing was held on the application of the CIO International Union United Automobile Aireraft and Agricultural Implement Workers of America, which is seeking to obtain the right to represent all Case production employees except pattern makers. We also told you in that letter that we would write you further in the event the Labor Board decided that there was a question of representation and ordered an election by secret ballot as to whether you desire to be represented by the Union in matters affecting your employment relationship with the Company.

Under date of January 26, 1942, the Labor Board made an order in which it held that the question of bargaining [fol. 58b] representation would have to be determined by the employees themselves in an election by secret ballot

conducted by the Labor Board. The Labor Board has not ruled that the CIO represents a majority of Case employees, but has said that this question must be settled by a secret ballot by the employees themselves.

On Wednesday, February 4, 1942, a meeting was held in Chicago at the request of the Labor Board for the purpose of arranging the details in connection with the election. Both the Union and the Company were represented at this meeting. In accordance with arrangements discussed at this meeting, the election will be held on Friday, February 13, between the hours of 1:00 P. M. and 5:00 P. M.

You will remember that at the time of the election in 1940 the Company offered to hold the election on Company time so that the earnings of the employees would not be affected. This was not satisfactory to the Union involved in that election. The Company representatives made this same offer yesterday and it was accepted. Accordingly, arrangements will be made to vote by departments, and employees will vote on Company time without loss of pay. Piece workers will receive average piece work earnings for the day for the time lost in voting. You will also remember that the last election was held at the fire station on Eighth Street. This election will be held on the Company's property and the voting will take place in the lunch room in the central building back of the first aid room.

It was also agreed that there can be no electioneering or campaigning in the plant, and on the day of the election within 100 yards of the plant. This is to assure you that no one can interfere with you or attempt to influence your free right to exercise your own choice in voting.

An official notice of the election stating these arrangements and the other rules, together with the form of ballot, will be issued by the National Labor Relations Board, and will be posted on the bulletin boards in the plant so that everyone may be informed. There will also be posted on the bulletin boards schedules regarding voting time by the various departments.

In accordance with the Labor Board's order, the following employees will be entitled to vote: All production and [fol. 58c] maintenance employees whose names are on the Company's payroll of January 24, 1942, including any employees who did not work during said payroll period because they were ill or on vacations, in active military service

or training in the United States, and employees who were then and have since been temporarily laid off, excluding all office and clerical employees and other supervisory employees and pattern makers, pattern makers' apprentices, and employees who have since quit or been discharged for cause.

At the time of the hearing held in December, the Union requested that certain individual employees be disqualified and refused permission to vote on the ground that they were supervisory employees. This matter was presented to the Labor Board, and the Labor Board has ruled that Paul Eastland, Russell Johnson and Loyd Cousin will not be permitted to vote. It has also ruled that Charles R. (Whitey) Clausen, Johnny Waters, Oliver Gordon, Walter Coghill, Frank DeFreeze, and Hank DeVooght, whom the Union also sought to exclude, are entitled to vote.

There will be a full and free opportunity for every qualified employee to vote in this election and to decide for himself whether he wishes to be represented by the CIO in matters respecting his employment relation with the Company, or whether he wishes to continue the present relationship existing between the Company and its employees. Every employee owes to himself, to his fellow employees and to the Company an obligation to carefully consider the issues that are involved in this election and to go to the polls and express his free choice.

Yours truly, J. I. Case Company, Rock Island Works,
T. E. Stahl, *Works Manager.*

[fol. 59] EXHIBIT E TO STIPULATION OF FACTS

100 Years' Service to Agriculture

J. I. Case Company

A Full Line of Farm Machinery

(Filed with Chief Trial Examiner, Apr. 16, 1942)

Rock Island Works, Rock Island, Illinois, 200 Seventh St.

March 19, 1942.

To All Employees of Rock Island Works of J. I. Case Company:

We wish to tell you about what has occurred subsequent to our letter of February 3 in connection with employment relations:

As you know, on February 13 a ballot was taken under the direction of the National Labor Relations Board. In this ballot, 352 of the employees voting indicated their wish to the represented by the International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O. for the purpose of collective bargaining; 190 of the employees voting indicated that they did not wish to be represented by the Union. Inasmuch as a majority of the employees voted in favor of the Union, the National Labor Relations Board on March 3, 1942 issued its certification as follows:

[fol. 60] "It Is Hereby Certified that International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, has been selected by a majority of all the production and maintenance employees, including Charles R. (Whitey) Clausen, Johnny Waters, Oliver Gordon, Walter Coghill, Frank DeFreeze, and Hank Devooght, of J. I. Case Co., Rock Island, Illinois, plant exclusive of office and clerical employees and Paul Eastland, Russell Johnson, Lloyd Cousins, and other supervisory employees, and pattern makers and pattern-makers' apprentices, as their representative for the purposes of collective bargaining, and that, pursuant to the provisions of Section 9 (a) of the National Labor Relations Act, International Union, United

Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O., is the exclusive representative of all such employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment."

As we told you in our letter of December 17, 433 Case employees have exercised their right to make individual contracts with the Company. These contracts continue until August 1, 1942, and their validity is not affected by the result of the ballot. Accordingly, when the Committee of the Union came to see the Management of the Rock Island Plant, and presented a collective bargaining contract for all employees, they were advised that the Company could not deal with the Union in any manner which affected the rights and obligations of the Company and its employees under the individual contracts while these contracts were still in effect.

The Company has advised the Union that it would deal with the representatives of the employees on matters which do not affect the rights of the employees under the individual contracts, and that it will deal with the Union as the exclusive bargaining agency for all employees in the unit on matters relating to hours, wages and conditions of employment when the present contracts expire.

The Union has advised the Company that it will not deal with the Company except on the basis of the contract [fol. 61] which it presented. In other words, the Union has taken the position that the Company must tear up its contracts with its individual employees and disregard the rights and obligations of its employees and of itself under those agreements. The Company believes and has been advised that the contracts for their term constitute legal and binding obligations both on the part of the Company and on the part of the employees, and that its individual employees have constitutional rights which they are entitled to have preserved and which the Company has no right to surrender.

Charges have been filed by the Union against the Company with the National Labor Relations Board predicated on its refusal, and statements have been made that unless it conforms to the wishes of the Union and disregards the contractual rights and obligations of itself and of its employees, a strike may be called.

The Company especially regrets this situation, but it cannot legally disregard its obligations to its employees who in good faith have entered into contracts with it.

Yours truly, J. I. Case Company, Rock Island Works,
(S.) T. E. Stahl, Works Manager.

T. E. Stahl:VL

1842 Case Centennial Jubilee 1942

General Office—Racine, Wisconsin

Factories—Racine, Wis.—Rockford, Ill.—Rock Island, Ill.
Burlington, Ia.

[fol. 62] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 8149

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

J. I. CASE COMPANY, Respondent

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD—Filed November 2, 1942

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C. § 151 et seq.), respectfully petitions this Court for the enforcement of its order against respondent, J. I. Case Company, Rock Island, Illinois, its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of J. I. Case Company and International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O., Case No. C-2180."

In support of this petition, the Board respectfully shows:

(1) Respondent is a Wisconsin corporation, engaged in business in the State of Illinois, within this judicial circuit,

where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, and including, without limitation, the record in a proceeding before the Board known as Case No. R-3394 (XIII-R-1047), a complaint and notice of hearing, respondent's answer to complaint, [fol. 63] amended complaint, respondent's amended answer to amended complaint, stipulation of April 13, 1942, and order transferring case to the Board, the Board on July 7, 1942, duly stated its findings of fact, conclusions of law, and issued an order directed to the respondent, its officers, agents, successors, and assigns. The aforesaid order provides as follows:

Order

Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, J. I. Case Company, Rock Island, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Giving effect to the individual contracts of employment or any modification, continuation, extension, or renewal thereof, or entering into any similar form of contract with its employees for any period subsequent to the date of this Decision;

(b) Refusing to bargain collectively with International Union, United Automobile, Aricraft & Agricultural Implement Workers of America, C. I. O., as exclusive representative of all production and maintenance employees at its Rock Island, Illinois, plant, including Charles R. (Whitey) Clausen, Johnny Waters, Oliver Gordon, Walter Coghill, Frank De Freeze, and Hank De Vooght, and excluding office and clerical employees and Paul Eastland, Russel Johnson, Loyd Cousin, and other supervisory employees, and pattern makers and pattern makers' appren-

tices, in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment;

(c) In any manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection as guaranteed in Section 7 of the Act.

[fol. 64] 2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Give separate written notice to each of its employees who signed an individual contract of employment or any modification, continuation, extension, or renewal thereof, or any similar form of contract for any period subsequent to the date of this Decision, that such contract will not in any manner be enforced or attempted to be enforced, that the employee is not required or expected by virtue of such contract to deal with the respondent individually, and that such discontinuance of the contract is without prejudice to the assertion of any legal rights the employee may have acquired under such contract;

(b) Upon request, bargain collectively with International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O., as the exclusive representative of all its production and maintenance employees, including Charles R. (Whitey) Clausen, Johnny Waters, Oliver Gordon, Walter Coghill, Frank De Freeze, and Hank De Vooght, and excluding office and clerical employees and Paul Eastland, Russel Johnson, Loyd Cousin, and other supervisory employees, and pattern makers and pattern makers' apprentices, in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment;

(c) Post immediately in conspicuous places throughout its Rock Island, Illinois, plant and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a), (b), and (c) hereof, and

(2) that the respondent will take the affirmative action set forth in paragraphs 2 (a) and (b) hereof;

(d) Notify the Regional Director for the Thirteenth Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

(3) On July 7, 1942, the Board's decision and order was served upon respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Messrs. [fols. 64a-66] Clark M. Robertson and Ben T. Reidy, respondent's attorneys in Milwaukee, Wisconsin and Rock Island, Illinois, respectively.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, the Board is certifying and filing with this Court a transcript of the entire record in the proceeding before the Board, including the pleadings, testimony, and evidence, stipulation, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, stipulation, and the proceedings set forth in the transcript and upon the order make thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring respondent, its officers, agents, successors, and assigns to comply therewith.

National Labor Relations Board, By /s/ Ernest A. Gross, by /s/ Ernest A. Gross, Associate General Counsel.

Dated at Washington, D. C., this 29th day of October, 1942.

Duly sworn to by Ernest A. Gross. Jurat omitted in printing.

[fol. 67] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT—October Term, 1942, January Session, 1943

No. 8149

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

J. I. CAS COMPANY, Respondent

On Petition for the Enforcement of an Order of the National Labor Relations Board

OPINION—February 26, 1943

Before EVANS, KERNER, *Circuit Judges*, and LINDLEY, *District Judge*.

LINDLEY, *District Judge*. Petitioner seeks to have enforced its order entered in mid-summer, 1942, directing respondent to cease and desist from certain acts declared violative of the National Labor Relations Act and to give notice of such action.

Beginning with 1937, respondent tendered to each of its employees at its Rock Island manufacturing plant a contract fixing wages and terms of employment for a year ending July 31, to be renewed from year to year, that in effect at the time of the hearing expiring July 31, 1942. Execution of this agreement was entirely voluntary, and in no way a condition precedent to initial employment or to continuation of employment. Approximately 75 per cent of the employees signed.

On January 26, 1942, an election having been held to determine the collective bargaining agent of the employees, [fol. 68] at which 352 votes were cast for International Union United Automobile, Aircraft & Agricultural Implement Workers of America, C.I.O., herein termed the Union, and 190 against, the Board certified the Union as the exclusive bargaining representative. On March 7, the Union requested the plant manager to bargain collectively with it, with respect to wages, hours and other conditions of employment, as the exclusive representative of all employees. Respondent refused, declaring that respondent could not negotiate with the Union in any matter affecting the rights and obligations of respondent and its employees "under

the individual contracts while the contracts remain in full force and effect." It expressed willingness to bargain on all matters which did not affect the rights of the respective parties under the contracts and to deal with the Union as exclusive bargaining agency upon all matters upon their expiration and, by letter, notified its employees of its decision, saying in part: "In other words, the Union has taken the position that the company must tear up its contracts with its individual employees and disregard the rights and obligations of its employees and of itself under those agreements. The Company believes and has been advised that the contracts for their term constitute legal and binding obligation both on the part of the Company and on the part of the employees, and that its individual employees have constitutional rights which they are entitled to have preserved and which the Company has no right to surrender."

The Board interpreted this action as refusal upon respondent's part to bargain collectively and further held that, by writing the letter referred to, the employer had interfered with, restrained and coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act. It insists here that, though respondent may enter into voluntary contracts with its individual employees, the existence of such agreements does not relieve it of its statutory duty to bargain collectively with the designated agent as the exclusive representative of the employees and that the power and right of the employer and employees to enter into individual contracts must be subordinated to and so effectuated as not to interfere with full achievement of the purpose of the Act, i. e., collective bargaining with the selected agency as the exclusive representative of all employees, and that to assert, as respondent did, that it [fol. 69] would not bargain collectively, except subject to and in accord with existing contracts, was *per se* a failure to bargain collectively.

Respondent, on the other hand, contends that, inasmuch as the contracts had been entered into between its employees and itself in good faith and were still in effect, to require collective bargaining as to the subject matter thereof was to interfere with freedom of contract; that the Act does not contemplate or require such interference with respondent's constitutional right to contract freely with its employees

and that the Board in its findings and conclusions exceeded its constitutional and statutory power.

Thus our rather narrow question is whether existing individual agreements with employees must yield to and be subordinated to the duty of the employer to bargain collectively with the Union as the exclusive agency, designated by law.

More specifically respondent insists that, under the language of *N. L. R. B.* v. *Jones and Laughlin*, 301 U. S. 1, 45, the duty of the employer to bargain collectively with the designated agency does not preclude "such individual contracts as the company may elect to make directly with individual employees" and asserts further authority for its position in the language of this court in *N. L. R. B.* v. *Bear Brand Hosiery Co.*, 131 F. (2d) 731 (C. C. A. 7). However, we believe that other decisions of the Supreme Court remove any uncertainty as to the full scope of the statutory duty of the employer to bargain collectively with the selected agency and as to the relationship of individual contracts with such duty, and establish the rule that inasmuch as the Act was expressly intended to promote and enacted under the constitutional congressional right to protect commerce, any existing contractual right interfering with effectuation of the legislative intent must yield to the duty imposed upon both employer and employees. Thus in *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350 at 364, the court said: "The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. • • • Obviously employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes or by insisting, more than in a private litigation that the em-[fol. 70] ployer's obedience to the Act cannot be compelled in the absence of the workers who have thus renounced their rights."

It follows, we think, that the duty to bargain collectively is necessarily paramount to the freedom of contract enjoyed prior to enactment of the statute or before a collective agent has been chosen. When once the majority of the employees have exercised their right to choose a representative for bargaining, the employer's obligation to deal exclusively with such representative as to all terms and conditions of

employment becomes unconditional irrespective of any individual bargain previously made. This is in accord with the rule announced in other decisions establishing the constitutionality of similar legislation. Contracts must be understood as having been made not only with reference to existing legislation but also with reference to the possible exercise of any rightful authority of the Government, and no obligation of existing contracts may be invoked to defeat that authority. *Knox* v. *Lee*, 12 Wall. 457-549-551; *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 305-311; *U. S. Machinery Co.* v. *U. S.*, 258 U. S. 451, 456; *Paramount Famous Corp.* v. *U. S.*, 282 U. S. 30; *Interstate Circ. Inc.* v. *U. S.*, 306 U. S. 208. "Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interest of the community is due process. • • • that the power to restrict freedom of contract may be exercised in the public interest with respect to contracts between employer and employee is undeniable. • • • the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the Power to interfere." *West Coast Hotel* v. *Parrish*, 300 U. S. 379, 391, 392, 394.

Whether we look upon the power of the Congress to enact such legislation as the exercise of a police power growing out of the commerce clause, such as is the source of power of the State in regulation of its citizens' activities, *Public Utilities Com.* v. *Quincy*, 290 Ill. 360; *Schiller Piano Co.* v. *Ill. Utilities Co.*, 288 Ill. 580; *Integrity Mut. Ins. Co.* v. *Boys*, 293 Ill. 307; *Ward* v. *Farwell*, 97 Ill. 593, or whether we characterize it by other appropriate terms, all citizens, in their relationship one to the other, must so act and so contract as not to interfere with or infringe upon full execution of the constitutional power. Inasmuch as the Congress [fol. 71] has been authorized by the constitution to enact the National Labor Relation Act, it follows that subsisting agreements, negativing, abridging or infringing upon full effectuation of the legislative purpose must fall. We can not believe it was the purpose of the Supreme Court in the Jones & Laughlin case to limit this doctrine in any wise. To attribute such an intent to the court is to infer necessarily that it intended to overrule the reasoning of many authorities to the contrary. *Holden* v. *Hardy*, 169 U. S. 366;

Knoxville Iron v. *Harbison*, 183 U. S. 13; *Patterson* v. *Bark Eudora*, 190 U. S. 169; *McLean* v. *Arkansas*, 211 U. S. 539; *Chicago, B. & Q. R. Co.* v. *McGuire*, 219 U. S. 549, 567; *Bunting* v. *Oregon*, 243 U. S. 426; *N. Y. Central R. Co.* v. *White*, 243 U. S. 188. It follows that inasmuch as respondent's action denied full force and effect to the provisions of the National Labor Relations Act, the Board rightfully directed it to cease and desist.

In view of our conclusion, respondent's communications to its employees were improper. Inasmuch as it could not rightfully refuse to bargain because, as it said, it was barred by various individual contracts, and inasmuch as the premise was unsound, it was improper to submit it to its employees as a circumstance influencing their action in selecting or recognizing a bargaining agent. The erroneous conclusion contained in the quoted language of its letter was such as to advise the employees that respondent considered that it had been wrongfully directed to bargain collectively without regard to the existing contracts. In taking this position, as we have seen, it was mistaken, and to bring to bear, as an influential factor upon its employees, the use of the erroneous conclusion, was an invasion of that neutrality required of employers in dealing with their employees prescribed by the act.

However, one provision of the order, we think is unjustified. The only complaint made against respondent or justified by the evidence was that it had erred in concluding that it had the right to insist upon the individual contracts in face of the statutory requirements to bargain with the exclusive bargaining agent selected. It erred as to its legal duty and in advising its clients of this erroneous position; beyond that there was no complaint. The individual contracts out of the way, respondent exhibited a perfect willingness to bargain collectively with the designated agent. Consequently the Board had jurisdiction only to order re- [fols. 72-79] spondent to cease and desist from the conduct complained of. The additional paragraph directing respondent to cease and desist from "in any manner" interfering with its employees in the exercise of their rights of self-organization and of bargaining collectively was a gratuitous, extraneous exercise of authority by the Board unjustified by the facts. *N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426; *N. L. R. B.* v. *Stone, et al.*, 125 F. (2d)

752 (C. C. A. 7); *Aluminum Ore Co.* v. *N. L R B.*, 131 F (2d) 485 (C. C. A. 7).

The order is modified by eliminating therefrom paragraph 1 (c) and as modified,

Enforced.

[fol. 80] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1942, JANUARY SESSION, 1943

No. 8149

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

J. I. CASE COMPANY, Respondent

On Petition for the Enforcement of an Order of the National Labor Relations Board

DECREE—Filed March 17, 1943

The National Labor Relations Board having issued an order against J. I. Case Company on July 7, 1942, and having petitioned this Court for enforcement of said order, and this Court having considered said petition and issued its decision on February 26, 1943, enforcing said order as modified, it is hereby

Ordered, Adjudged and Decreed that J. I. Case Company, Rock Island, Illinois, and its officers, and agents, shall:

1. Cease and desist from:

(a) Giving effect to the individual contracts of employment or any modification, continuation, extension, or renewal thereof, of entering into any similar form of contract with its employees for any period subsequent to the date of this Decree;

[fol. 81] (b) Refusing to bargain collectively with International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O., as exclusive representative of all production and maintenance employees at its Rock Island, Illinois, plant, including Charles R. (Whitey) Clausen, Johnny Waters, Oliver Gordon, Walter Coghill, Frank DeFreeze, and Hank DeVooght, and excluding office and clerical employees and Paul East-

land, Russel Johnson, Loyd Cousin, and other supervisory employees, and pattern makers and pattern makers' apprentices, in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment;

(c) In any manner interfering with the efforts of International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O., to bargain collectively with it as the exclusive representative of all production and maintenance employees at its Rock Island, Illinois, plant, including Charles R. (Whitey) Clausen, Johnny Waters, Oliver Gordon, Walter Coghill, Frank DeFreeze, and Hank DeVooght, and excluding office and clerical employees and Paul Eastland, Russel Johnson, Loyd Cousin, and other supervisory employees, and pattern makers and pattern makers' apprentices, in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Give separate written notice to each of its employees who signed an individual contract of employment or any modification, continuation, extension, or renewal thereof, or any similar form of contract for any period subsequent to the date of this Decree, that such contract will not in any manner be enforced or attempted to be enforced, that the employee is not required or expected by virtue of such contract to deal with respondent individually, and that such discontinuance of the contract is without prejudice to the assertion of any legal rights the employee may have acquired under such contract;

[fols. 82-87] (b) Upon request, bargain collectively with International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O., as the exclusive representative of all its production and maintenance employees, including Charles R. (Whitey) Clausen, Johnny Waters, Oliver Gordon, Walter Coghill, Frank DeFreeze, and Hank DeVooght and excluding office and clerical employees and Paul Eastland, Russel Johnson, Loyd Cousin, and other supervisory employees, and pattern makers and pattern makers' apprentices, in respect to

rates of pay, wages, hours of employment, and other terms and conditions of employment;

(c) Post immediately in conspicuous places throughout its Rock Island, Illinois, plant and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices stating: (1) that respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a), (b), and (c) hereof, and (2) that respondent will take the affirmative action set forth in paragraphs 2 (a) and (b) hereof;

(d) Notify the Regional Director for the Thirteenth Region in writing within ten (10) days from the date of this Decree what steps respondent has taken to comply herewith.

Dated this 13th day of March 1943.

Evan A. Evans, Judge, United States Circuit Court of Appeals for the Seventh Circuit. Otto Kerner, Judge, United States Circuit Court of Appeals for the Seventh Circuit. Walter C. Lindley, Judge, United States Circuit Court of Appeals for the Seventh Circuit.

[fol. 88] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 89] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, A. D. 1942

No. —

J. I. CASE COMPANY, Petitioner,

—

NATIONAL LABOR RELATIONS BOARD, Respondent

On Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit

STIPULATION REGARDING PRINTED RECORD

It is hereby stipulated and agreed by and between J. I. Case Company, Petitioner, and National Labor Relations Board, Respondent, by their respective attorneys, that the following portions of the Record shall be printed and constitute the record on the petition for writ of certiorari:

1. Proceedings in the Circuit Court of Appeals:
(a) Petition of National Labor Relations Board for enforcement of Board's Order.
(b) Opinion of the Court.
(c) Decree entered by Court.
2. First amended charge filed with the National Labor Relations Board by International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, C. I. O., dated March 27, 1942.
[fol. 90] 3. Amended complaint issued by National Labor Relations Board and filed April 16, 1942.
4. Amended answer of J. I. Case Company to the complaint filed April 16, 1942.
5. Stipulation and agreed statement of facts before the National Labor Relations Board dated April 13, 1942, together with the exhibits thereto attached.
6. Decision and Order of the National Labor Relations Board in Case No. C-2180.

John C. Gall, Clark M. Robertson, Attorneys for J. I. Case Company, Petitioner. Charles Fahy, Solicitor General of the U. S. for National Labor Relations Board, Respondent.

Dated April 28, 1943.

[fol. 91] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 21, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. Counsel are requested to discuss in their briefs and on oral argument the question whether the case is moot.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Roberts took no part in the consideration or decision of this application.

NO. 1039 67

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

J. I. CASE COMPANY, a Corporation, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CLARK M. ROBERTSON,
JOHN C. GALL,
BEN T. REIDY,
HOWARD R. JOHNSON,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No.

J. I. CASE COMPANY, a Corporation, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

J. I. Case Company, your petitioner, prays that a writ of certiorari be issued to review a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, approving, with a single modification, an order of the National Labor Relations Board, and a decree by that Court enforcing compliance with the requirements of that order.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 57-62) is reported in 134 Fed. 2d. 70. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 9-53) are reported in 42 N. L. R. B. No. 27.

JURISDICTION.

The opinion of the Circuit Court of Appeals was filed, and its original judgment of approval with modification entered February 26, 1943 (R. 57-62). The decree of the Circuit Court of Appeals enforcing compliance with the Board order, was entered on March 17, 1943 (R. 62-64). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and under Section 10(e) of the National Labor Relations Act.

QUESTIONS PRESENTED.

The following questions are presented for consideration in connection with this petition for writ of certiorari:

1. Does the certification of representatives under the National Labor Relations Act for the purpose of collective bargaining, supersede valid and unexpired individual contracts of employment entered into prior to the certification, where such individual contracts (a) contain no provisions repugnant to the Act, and (b) are entered into freely and voluntarily and unaccompanied by any unfair labor practice?

2. Does the National Labor Relations Act abrogate the right of individual contract between employer and employee after the selection of representatives for the purpose of collective bargaining where the contracts are not a condition of employment; are freely and voluntarily entered into by the employees; contain no provision repugnant to the Act, and are not entered into for the purpose of interfering with, restraining or coercing employees in the exercise of rights under the Act?

3. Does the assertion by an employer of concededly valid individual contracts of employment in connection with the scope of collective bargaining issues, constitute an unfair labor practice under the National Labor Relations Act and confer authority on the National Labor Relations Board to invalidate the contract?

4. Has the National Labor Relations Board power to enjoin in perpetuity the entering into of individual contracts not containing provisions repugnant to the National Labor Relations Act, or entered into for the purpose of interfering with, restraining or coercing employees in the exercise of their rights under the Act?

THE NATIONAL LABOR RELATIONS BOARD AND THE CIRCUIT COURT OF APPEALS ANSWERED ALL THESE QUESTIONS IN THE AFFIRMATIVE.

STATUTES INVOLVED.

The pertinent provisions of the National Labor Relations Act, July 5, 1935, 49 Stat. 449, 29 U. S. C. sec. 151, *et seq.* are

"Rights of Employees.

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

"Sec. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

"* * * *

"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

STATEMENT.

This proceeding involves an order of the National Labor Relations Board directing J. I. Case Company to refrain from giving effect to individual contracts of employment, or entering into any similar form of contract for any period subsequent to the date of the Board's order, and directing the Company to bargain collectively with International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C.I.O., irrespective of the individual contracts.

The case is presented upon an agreed statement of facts (R. 28-53). The facts, insofar as material to the issues presented, are as follows:

J. I. Case Company is engaged in the manufacture and distribution of farm machinery operating plants in Wisconsin, Illinois and Iowa. The plant involved in this proceeding is located at Rock Island, Illinois. This plant was acquired by J. I. Case Company and placed in operation during the year 1937 (R. 30). In the fall of 1940 the Farm Equipment Workers Organizing Committee, C.I.O., instituted representation proceedings before the National Labor Relations Board, and in an election held November 28, 1940, the employees rejected the Union as their bargaining representative. (R. 46) Approximately a year later a successor Union, namely, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C.I.O., instituted similar proceedings before the National Labor Relations Board. As a result of this proceeding, an election was held on February 13, 1942. In this election a majority of the employees in the bargaining unit as found by the National Labor Relations Board, designated the last mentioned Union for the purpose of collective bargaining (R. 33). No question is presented regarding the representation proceeding or the Certification of Representatives.

Commencing with the acquisition of the plant in 1937, J. I. Case Company had offered annually to each of its employees individually, a contract of employment, and these contracts were executed with each of approximately 75 per

cent of the employees. From time to time, at the beginning of each factory year, certain of said contracts were renewed, and certain new contracts entered into. The employees executing said contracts were not necessarily the same from time to time. Certain employees executed said contracts who had not executed them during the preceding factory year, and other employees who had previously executed contracts failed to renew them. However, the percentage of contracts in effect at all times remained as above set forth. The factory year involved in this case commenced August 1, 1941, and ended July 31, 1942, and there were in effect at the time of the representation proceeding, (February 1942) 433 of such contracts of which 415 were with employees in the bargaining unit consisting of 582 employees (R. 31). The stipulation (R. 32) states:

> *"For the purposes of this stipulation the Board does not contend that the execution of said contracts was a condition of employment or that the status of individual employees was affected by reason of signing or failing to sign said contracts."* (Italics supplied.)

After the certification of the Union as collective bargaining representative, the Union requested the Works Manager at the Rock Island plant to bargain collectively with it regarding the rates of pay, wages, hours of employment, and other conditions of employment as the exclusive representative of all employees in the bargaining unit and submitted a proposed form of collective agreement. The Works Manager, in response to the Union's request, advised the Union that the Company would not deal with it in any manner affecting the rights and obligations of the Company and its employees under the individual contracts while the contracts remained in full force and effect. He further advised the Union that the Company would deal with it on matters which did not affect the rights of the Company and the employees under the individual contracts, and upon the expiration of the individual contracts it would deal with the Union as the exclusive bargaining agency for all employees in the bargaining unit (R. 33).

The unfair labor practice charged to respondent in connection with its refusal to bargain collectively, arose out of a communication by the Company to its employees reporting to them what had taken place between the Company and the Union representatives. This letter to the employees was dated March 19, 1942, and contained the following provision quoted by the Court in its opinion: (R. 58)

> "The Union has advised the Company that it will not deal with the Company except on the basis of the contract which it presented. In other words, the Union has taken the position that the Company must tear up its contracts with its individual employees and disregard the rights and obligations of its employees and of itself under those agreements. The Company believes and has been advised that the contracts for their term constitute legal and binding obligations both on the part of the Company and on the part of the employees, and that its individual employees have constitutional rights which they are entitled to have preserved and which the Company has no right to surrender."

On March 27, 1942, charges were filed with the National Labor Relations Board (R. 1-2), and on April 15, 1942, the Board issued its amended complaint (R. 2-5). The answer was filed on April 16, 1942, (R. 6-8), and on July 7, 1942, the National Labor Relations Board issued its decision and order (R. 9-56). The order directed J. I. Case Company to cease and desist from (a) giving effect to the individual contracts of employment, or entering into any similar form of contract with its employees for any period subsequent to the date of the Board's decision, (b) refusing to bargain collectively with the Union, and (c) in any manner interfering with, restraining or coercing its employees in the exercise of their rights under the National Labor Relations Act. (R. 25-26)

The Board also ordered the Company to take the following affirmative action (a) give separate written notice to each of its employees who had signed an individual contract, that the contract would not be enforced or attempted to be

enforced, but that the discontinuance of the contract was without prejudice to the assertion by the employee of any right which he may have acquired thereunder, (b) upon request, to bargain collectively with the Union, (c) to post in conspicuous places in its Rock Island plant, and maintain such posting for a period of sixty days, appropriate statements of its compliance with the order, and (d) to give the usual notice to the Board of its compliance (R. 26-27).

The Court below sustained the order of the Board in all respects, with the exception of a modification of the provision enjoining in general terms the violation of the National Labor Relations Act.

SPECIFICATIONS OF ERRORS.

The Circuit Court of Appeals erred—

(1) In depriving petitioner of its rights under the Fifth Amendment to the Constitution of the United States to make individual contracts of employment with employees so desiring to contract.

(2) In affirming and approving the power and authority of the National Labor Relations Board to invalidate individual contracts valid in their terms and inception, and to perpetually enjoin the making of such contracts.

(3) In approving the order of the National Labor Relations Board that the assertion by petitioner of the continuing effectiveness of individual contracts of employment, valid in their terms and inception, constituted an unfair labor practice within the provisions of the National Labor Relations Act.

(4) In depriving petitioner of its constitutional right of free speech to report correctly to its employees the proceedings between the Company and the Union representatives.

REASONS FOR GRANTING THE WRIT.

Petitioner submits that the decision of the Circuit Court of Appeals is contrary to and conflicts with the decision of this Court in the case of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1. The Circuit Court of Appeals held that the *Jones & Laughlin* case was no longer authoritative on the question involved here, but was impaired, if not overruled, by other decisions of this Court. (R. 59).

The Circuit Court of Appeals stated in its opinion (R. 59):

> "Thus our rather narrow question is whether existing individual agreements with employees must yield to and be subordinate to the duty of the employer to bargain collectively with the Union as the exclusive agency, designated by law."

The Supreme Court of the United States has dealt with the validity of individual contracts which were the fruits of an unfair labor practice and which contained provisions repugnant to the Act. *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350. *National Labor Relations Board* v. *Stone*, 125 Fed. 2d, 752. (Cert. denied October 12, 1942, Case No. 200).

This is the first occasion that there has been presented to this Court the question of the continuing effectiveness of an individual contract between an employer and an employee where the contract is concededly valid in its terms and inception.

The National Labor Relations Board Was Without Authority to Invalidate the Individual Contracts of Employment and to Enjoin Petitioner in Perpetuity from Entering Into Individual Contracts With Its Employees.

The National Labor Relations Act does not forbid individual contracts of employment. In the case of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301

U. S. 1, this Court held that an individual contract between an employer and an employee is sanctioned and is not forbidden by any provisions of the National Labor Relations Act. This Court in its opinion, interpreting the appropriate Section of the National Labor Relations Act, makes the following statement (pp. 44-45):

> "* * * The provisions of section 9(a) that representatives, for the purpose of collective bargaining, of the majority of the employees in an appropriate unit shall be the exclusive representatives of all the employees in that unit, imposes upon the respondent only the duty of conferring and negotiating with the authorized representatives of its employees for the purpose of settling a labor dispute. This provision has its analogue in section 2, Ninth, of the Railway Labor Act, as amended (45 U. S. C. A. Sec. 152, subd. 9), which was under consideration in Virginian Railway Co. v. System Federation No. 40, supra. The decree which we affirmed in that case required the railway company to treat with the representative chosen by the employees and also to refrain from entering into collective labor agreements with any one other than their true representative as ascertained in accordance with the provisions of the Act. We said that the obligation to treat with the true representative was exclusive and hence imposed the negative duty to treat with no other. We also pointed out that, as conceded by the government, the injunction against the Company's entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was 'designed only to prevent collective bargaining with any one purporting to represent employees' other than the representative they had selected. It was taken 'to prohibit the negotiation of labor contracts, generally applicable to employees' in the described unit with any other representative than the one so chosen, 'but not as precluding such individual contracts' as the Company might 'elect to make directly with individual employees'. We think this construction also applies to section 9(a) of the National Labor Relations Act (29 U. S. C. A. Sec. 159(a)).
>
> "The Act does not compel agreements between employers and employees. It does not compel any agree-

ment whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.''

It is clear from the decision of the Court—

(1) The obligation of the employer is to deal with no other *collective* bargaining representative than the one chosen under the provisions of the Act; (2) the collective representative so chosen is the agent of all the employees in the appropriate unit for purposes of *collective* bargaining, and (3) the selection of the agent does not destroy the right of the individual principal voluntarily to execute his *individual* contract of employment.

The Circuit Court of Appeals, in its opinion, indicates that the language quoted has been rejected in subsequent opinions of the Court, or that at any rate this Court did not mean what it said in the *Jones & Laughlin* case. We have searched the decisions of this Court in vain for any statement expressly overruling or modifying the above quoted provision. We are likewise unable to find any language of this Court which by implication modifies or overrules the opinion. The only case to which the Circuit Court of Appeals makes reference in support of its statement is the case of *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350. There is no reference in that decision to the *Jones & Laughlin* case. The facts in the *National Licorice* case are entirely different. The Court was there dealing with a contract which had been found to be the fruit of an unfair labor practice forbidden by the National Labor Relations Act, and containing provisions repugnant to the Act. There is no such finding or determination in the case at bar, —in fact, the finding and determination is to the contrary.

We submit, therefore, that the decision in the *Jones & Laughlin* case remains and is effective and controlling upon the case at bar, and that the power delegated to the National Labor Relations Board pertains only to contracts repugnant to the Act or resulting from a violation of the Act.

The National Labor Relations Act was addressed to a situation existing where the employer declined to deal collectively with his employees. The preamble to the National Labor Relations Act refers to this circumstance and its resulting labor disputes, and the declared purpose of the Act is to eliminate those disputes, by preventing the employer from creating them in the manner indicated and thus to protect the right of employees to bargain collectively, but not to require them to do so. It does not follow that the employee who wishes to deal individually may not do so, nor that, having so dealt, his contract does not have the full force and effect of any other contract, assuming, of course, that it is not otherwise objectionable. Any intent on the part of Congress to destroy this long existing right should be expressed in clear and unmistakable terms and not left to construction. It was with these rights and with this interpretation that Mr. Justice Hughes was dealing in the opinion in the *Jones & Laughlin* case, and his decision was obviously predicated upon the well-established constitutional principles of freedom of contract.

It is apparent from the language of the Court in the *Jones & Laughlin* case that the Court was seeking an interpretation which would not interfere with the liberty of contract of the individual guaranteed by the Constitution and forming the basis of a long line of decisions of the courts. In reaching its conclusions the Court did not overrule in principle any one of these decisions, but held them inapplicable in view of the construction it placed upon the Act (301 U. S. 1, 45). It is apparent that if the Court had felt the Act necessitated a construction interfering with freedom of contract, a different conclusion would have been reached on the constitutional question involved.

That the right to freedom of contract is not absolute but may be limited and regulated in the public interest in accordance with necessity and within constitutional limits, is, of course, well settled. But as this Court has many times pointed out, freedom of contract is the rule and restraint is

the exception. *Chas. Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522.

Legislatures have from time to time enacted regulations with respect to the legitimate subject matter of contracts. However, such regulation is an entirely different matter from the complete destruction of the right of individuals, admittedly legally competent, to contract concerning their affairs.

There are many classes of persons who are treated as wards of government, or as the subject of peculiar protection. For example, limitations upon the right of contract are recognized in the case of infants and insane persons. In the instant case, however, we are dealing with persons who are in no sense declared by statute to be incompetent to manage their own affairs and make contracts with respect thereto. The position of the National Labor Relations Board is that the individuals whose contracts are here under consideration are fully competent to select collective bargaining agents and to contract through them with respect to wages, hours, and conditions of employment, but that the same individuals are prohibited from entering into voluntary individual contracts of employment directly with their employer.

There is no language in the National Labor Relations Act conferring power upon the Board to so construe the Act. It is one thing to modify, limit, or regulate contracts where they deal with a forbidden subject matter or contain provisions opposed to public policy, but it is quite a different thing to deprive an American citizen, whether employee or employer, entirely of his right and freedom to make a contract, as is done by the perpetual injunction issued in this case. Such perpetual injunction is not remedial in character, but is clearly punitive in that it bears no reasonable relation to the unfair labor practice allegedly involved. It is therefore not warranted by the provisions of the National Labor Relations Act. *Republic Steel Corp.* v. *National Labor Relations Board,* 311 U. S. 7.

The Circuit Court of Appeals adverts to the principle that all contracts must be assumed to be entered into with reference to the possible subsequent exercise of governmental authority, and hence concludes that the individual contracts of employment under consideration here were subject to abrogation at any time a majority of the employees determined to bargain collectively. This conclusion was qualified both by the National Labor Relations Board and the Circuit Court of Appeals in one important respect. The contracts and the rights thereunder were upheld as to the individual employees who were parties to them but were denied as to the employer who was the other party to the same contracts. Thus, we submit, an anomalous situation is created whereby contracts admittedly valid in their inception, are left binding upon one of the contracting parties, while the other contracting party is absolved from performance. The answer attempted by the Board and the Court is that this result is in the nature of a penalty imposed upon the employer for having mistakenly asserted the continuing validity and effectiveness of the contracts. That is to say, if the view of the Board and the Circuit Court of Appeals be sustained, if the employer had remained silent and disregarded the individual contracts, the contracts would have remained valid and enforceable as to both the employer and the employee. But because the employer communicated to the employees his view as to the legal effect of the certification by the National Labor Relations Board, the Board claimed authority under the *remedial* provisions of the National Labor Relations Act, to *penalize* the employer by holding that he could no longer assert any rights under the contracts but that his obligations under such contracts were still in full force and effect at the option of the other parties to the contracts.

If the reasoning of the Circuit Court of Appeals is to be sustained, either both parties to an individual contract of employment must be similarly affected by the selection of collective representatives, or neither of them should be—

that is to say, it can not fairly be held that the employer must proceed to bargain collectively on all subjects and contract in a way which may conceivably violate his obligation to individual employees within the bargaining unit, and thereby confer upon them a right of action for breach of contract which he himself is powerless to prevent without running the risk of being in violation of the National Labor Relations Act.

Of course, in order to reach this result it is necessary to declare that when representatives are selected for the purposes of collective bargaining, all previous agreements between the employer and the individual employee, or between the employer and other groups of employees within the same bargaining unit, are at once superseded and abrogated. We submit that no such construction is authorized by the National Labor Relations Act.

The construction adopted by the Board and the Circuit Court of Appeals presents an interesting and important question in the field of contract law. The National Labor Relations Act was drafted on the theory that the collective bargaining representative is, as implied by the term, the agent of the employees for the purpose of collective bargaining. The employees are the principals. The principals here, or a substantial number of them, have executed valid individual contracts of employment. It is difficult to find any support in the principles of contract law for the proposition that they may avoid the obligations of their individual contracts of employment by selecting an agent for carrying on collective bargaining.

The Assertion by Petitioner of the Validity and Continuing Effectiveness of Individual Contracts of Employment Was Not An Unfair Labor Practice and Such Assertion, Together With Correctly Reporting to Employees Negotiations Between the Union and the Petitioner, Was Within Petitioner's Constitutional Right of Free Speech.

There is, of course, no question presented in the event petitioner was correct in its conclusion regarding the continuing effectiveness of the individual contracts of employment. This is recognized in the decision of the Circuit Court of Appeals. That Court was of the opinion that petitioner, by advising the employees that the individual contracts were still in force, committed an unfair labor practice. We do not believe that this conclusion is warranted. Petitioner cannot be said to have boldly stepped forward and asserted an interpretation of the National Labor Relations Act unsupported by authority. In fact, petitioner believed then and believes now that its interpretation was fully supported by the authority of the Supreme Court of the United States. It is difficult to see how petitioner's letter of March 19th reporting correctly the proceedings between it and the Union representatives could have affected the right of its employees to join or form a labor organization of their own choosing, inasmuch as at that time the election had taken place and a certification of the Union as collective bargaining representative had been issued by the National Labor Relations Board. This Court has zealously protected in the public interest the preservation of the right of free speech in labor matters. *Thornhill* v. *Alabama*, 310 U. S. 88.

We submit that regardless of the determination with respect to the effect of the certification of the collective bargaining representative on the individual contracts the report which petitioner made to its employees was within the constitutional guaranty and protected by the First Amendment, and can not therefore be regarded as a violation of Section 8(1) of the National Labor Relations Act.

CONCLUSION.

In conclusion, we submit that the opinion of this Court in the *Jones & Laughlin* case remains unreversed and unmodified and that the Circuit Court of Appeals was in error in holding otherwise. Any other conclusion presents an important question for the reconsideration of this Court as to the constitutionality of the National Labor Relations Act itself. In the *Jones & Laughlin* case this Court reviewed the various substantial grounds which were urged upon it in support of the view that the statute was unconstitutional. One of those grounds was that the statute necessarily destroyed individual contract rights and thus was in conflict with the Fifth Amendment to the Constitution of the United States. This Court upheld the constitutionality of the National Labor Relations Act and one of the express grounds on which it did so was its conclusion that the statute did not by its terms impair the right of individual contract or authorize the National Labor Relations Board to do so. If it now be held that the statute *does* impair or destroy these basic constitutional rights or *does* authorize the National Labor Relations Board to accomplish that result, then, we submit, the validity of the National Labor Relations Act is again drawn in question and should be determined by the Court in the light of this new construction.

Substantial and important constitutional questions are herein presented.

Respectfully submitted,

May, 1943.

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JOHN C. GALL,
BEN T. REIDY,
HOWARD R. JOHNSON,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

J. I. CASE COMPANY, a Corporation, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD.

REPLY BRIEF FOR PETITIONER TO BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD.

CLARK M. ROBERTSON,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 1039.

J. I. CASE COMPANY, a Corporation, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD.

REPLY BRIEF FOR PETITIONER TO BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD.

INTRODUCTORY STATEMENT.

The Petition for Writ of Certiorari filed by Petitioner sets forth the opinions below, the jurisdiction of this Court, and the questions presented here. The purpose of this Reply Brief is to correct certain statements appearing in the Brief of the National Labor Relations Board and to answer certain of the arguments therein. For the sake of convenience, matters discussed in this Reply Brief will be presented in the order in which they appear in the Brief of the National Labor Relations Board.

QUESTIONS PRESENTED.

1. Question 1, as stated by the Board on page 2 of its Brief, does not correctly state the issue.

The issue presented by the Union and the issue on which the charge of an unfair labor practice was based was not a question of changing by collective bargaining any of the terms and provisions of an existing agreement but was predicated upon the Union's position that the individual contracts were of no effect, and its demand upon the Petitioner to disregard entirely the rights and responsibilities of such contracts. (R. 52.) Thus the issue, as stated by Petitioner in its petition, is whether individual contracts are superseded by the selection of a collective bargaining representative. The question as stated by the Board is entirely academic in this proceeding and was first advanced after the charge had been filed and the complaint issued. Petitioner does not challenge the correctness of the proposition that individual contracts can be changed by collective action. It so stated in its Brief filed with the Board and quoted the same statement in its Brief before the Circuit Court of Appeals (p. 15) as follows:

> "In the absence of specific delegation of authority looking toward the revision of the now existing contracts, these contracts cannot be changed by collective action. That is to say, the collective representative could negotiate changes in the individual contracts for the individuals it actually represented."

In other words, Petitioner's position was and is that collective bargaining representatives may bargain with respect to changes in valid existing individual agreements provided the collective bargaining representatives have been so authorized by the individuals who are parties to those contracts. Mere selection of a collective bargaining agency by a majority of the employees in the unit does not, however, *ipso facto*, authorize such collective bargaining agency to bargain away rights of individual employees

without specific authorization from the latter. That the collective bargaining agency chosen by a majority of the employees in the present instance had not been specifically authorized to bargain with respect to at least some of the individual contracts, is evident from the fact that it is a mathematical impossibility for all of the holders of the individual contracts to have voted for the bargaining agency in the National Labor Relations Board election. In fact, it is evident that many of the holders of such contracts voted against the bargaining agency so chosen by the other employees (R. 31, 51). The Petitioner's position is in accordance with familiar principles of the law of Contracts and the law of Agency, which have not been superseded by the National Labor Relations Act.

2. The second question stated by the Board on page 2 of its Brief states a conclusion rather than a question. The question, as stated by Petitioner in its Petition, is whether the assertion by Petitioner of the validity and continuing effect of the individual contracts was a utilization of such contracts in interference with the rights of employees guaranteed under the Act.

Of course, if we assume, as the Board does in the statement of the question, that the individual contracts were utilized to interfere with the rights of employees, the question presented by the Board would be answered by its mere statement.

The question stated by the Board is, furthermore, incomplete in that the Order of the Board did not merely require the employer to cease and desist from giving effect to existing valid contracts of employment, but precluded the employer from making any new individual contracts of employment under any circumstances in future. Even if the Board had properly found that existing contracts had been utilized for the purpose of interfering with the right of employees, Petitioner denies that this would have authorized the Board to issue a permanent injunction against making any future valid contracts, thus imposing a penalty

not only upon the Petitioner but upon present and future employees of Petitioner.

3. In the opinion of Petitioner the questions presented for the determination of this Court are correctly stated at pages 2 and 3 of its Petition for Writ of Certiorari.

STATEMENT.

In the last paragraph on page 3 of the Board's Brief and concluding at the top of page 4, reference is made by the Board to Petitioner's letter to its employees dated December 17, 1941, and the Board states:

> "The letter set forth the Company's assertion at the hearing that the individual agreements were a bar to the designation of a union as the exclusive bargaining representative of the employees."

Petitioner's letter to which reference is made actually stated as follows (R. 47):

> "The Company asks that the petition be denied in view of the fact that the union did not represent a majority, or even a substantial number of the Case employees involved, and furthermore showed to the Board that on the payroll of November 22, 1941, 433 of the employees had exercised their right to make individual contracts with the Company."

On page 4 of its Brief the Board states that the Petitioner refused to bargain collectively with the Union as the exclusive representative of the employees in the bargaining unit.

The position of Petitioner in this respect is set forth on page 52 of the Record. At no time has Petitioner challenged the exclusive representation by the Union for purposes of collective bargaining, or refused to deal with the Union as the exclusive collective bargaining representative pursuant to the Board's certification.

Petitioner's insistence with respect to the validity and continuing effect of its contractual relationship, cannot be

construed as a refusal to bargain in the face of the Union's insistence that this relationship was abrogated and must be disregarded.

ARGUMENT.

1. The Board in its Brief states that Petitioner has taken the position that it "automatically exempted itself, for the duration of such agreements, from its duty to bargain collectively with respect to matters covered therein". (Board's Brief, page 6). As shown above, (R. 52) the Company took no such position and its position in this respect is stated on page 2 of this Reply Brief.

2. The Board in its Brief, pages 6 and 7, has undertaken to define the duty to bargain collectively as imposed by the National Labor Relations Act. It interprets the legislative findings set forth in Section I of the Act as meaning that because of a gross inequality of bargaining power, it is *necessary* for employees to act in concert in order to obtain fair terms of employment. Accordingly, the Board concludes that the Congress intended that the selection of a collective bargaining agent superseded any rights of individual contract which might theretofore have existed on the part of any of the employees in the unit.

In support of this interpretation the Board cites the legislative findings in the Norris-LaGuardia Act.

Petitioner believes that there is no warrant in the terms of the National Labor Relations Act, Section I, for the conclusion that Congress intended to abrogate the right of individual contract of to supersede such rights upon the selection of a collective bargaining agent. On the contrary, this Court, in the *Jones & Laughlin* Case (301 U. S. 1), emphasized that there was no conflict between the exercise of individual right of contract and the right of collective bargaining under the Act. The Board's interpretation of Section I of the Act and of this Court's decision in the *Jones & Laughlin* Case, emphasizes the importance of this issue and the necessity for this Court to interpret the statute and its own decision.

Furthermore, the Board, in relying upon the legislative findings in the Norris-LaGuardia Act, apparently ignores the fact that that Act specifically recognizes not only the *right of association* but the *right of non-association*, in express words.[1] If this declaration on the part of Congress means anything, it must mean that the Congress was as much concerned with the preservation of individual rights as the guarantee of collective rights. It is to be noted, also, that by the terms of the National Labor Relations Act, (Section 1) the provisions of the Norris-LaGuardia Act (including this declaration of policy), are fully preserved.

There is no provision in the Norris-LaGuardia Act, the National Labor Relations Act, or, it is believed, in any of the decisions of this Court, which warrant the Board in its conclusion that it is "*necessary*" for employees to act in concert. The public policy expressed in those statutes and sustained in the decisions of this Court, is only that where employees desire to bargain collectively they should be protected in the exercise of their right to do so. Neither is there in these statutes or in the decisions of this Court any basis for the Board's conclusion that the National Labor Relations Act intended to "*supplant*" individual rights by the mere exercise of collective rights by a majority of the employees in the unit. This, in essence, is the very doctrine repudiated by this Court in the *Jones & Laughlin* Case.

3. On pages 9 and 10 of its Brief, the Board discusses the provision of the Order perpetually enjoining Petitioner from entering into individual contracts with its employees, and concedes that the Order is broad enough to support this construction. The Board, however, states that it was not so intended and that Petitioner is not prevented from lawfully contracting with employees individually under circumstances which negative any attempt to interfere with their rights. The Board states that its position in this respect was included in its Brief before the Circuit Court of

[1] Norris-La Guardia Act, 47 Stat. 70, 29 U. S. C. 102.

Appeals. Petitioner stated in its Brief before the Circuit Court of Appeals as follows (page 6):

> "Respondent asserts and has asserted its right to enter into individual contracts of employment with employees desiring to make such contracts, where such contracts are not a condition of employment and are freely and voluntarily entered into by the employees and do not contain provisions repugnant to the National Labor Relations Act, and are not entered into for the purpose of interfering with, restraining, or coercing its employees in the exercise of their rights under the Act."

If the Board concurred, as it now states, its concurrence in this statement was so obscure that it was not detected either by the Petitioner or by the Circuit Court of Appeals.

4. On page 11 of the Board's Brief the proposition is advanced that there is no occasion at the present time for a review of the Board's order requiring the cancellation of the contracts since the contracts expired July 31, 1942, and although this does not render the issue "moot", it renders it of no "present practical importance." This is, indeed, a most interesting statement. The situation in this respect is no different now than it was at the time the case was presented to the Circuit Court of Appeals. Petitioner in its Brief to the Circuit Court of Appeals pointed out exactly the same circumstances now presented by the Board and made the point which the Board now makes. Counsel for the Board replied most vigorously in the oral argument to the effect that the public interest was involved and hence the issue could not be moot and must be determined, citing *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261. It seems most unusual for the Board, in the face of having had the issue decided in its favor, to now resist a review of the Board's Order on the ground it so vigorously protested before the Circuit Court of Appeals.

Furthermore, the Board, in now arguing that this Court should not grant certiorari because the questions presented

are of no present practical importance, entirely ignores the fact that this Petitioner was not only required by the Board's Order to cease asserting any rights under then existing individual contracts, but was permanently enjoined from entering into similar contracts in the future. It can hardly be urged that a permanent injunction of this nature is of no practical importance to Petitioner or to present or future employees who may wish to exercise rights which they believe they have under the law and decisions of this Court and which now appear to be conceded by the Board.

The Board, on page 12 of its Brief, also interprets its Order as merely preventing "extension or renewal or remaking" of the particular individual contracts which were in existence when the collective bargaining agent was certified. However, the Board's Order is much broader than its interpretation of its Order in that the Order would likewise preclude the making of new agreements with other employees in the future under the circumstances described in the Board's Order.

CONCLUSION.

Petitioner submits that the decision below is erroneous; that it presents a conflict of decisions; and that the necessity for the granting of the Petition for Certiorari is emphasized by the Brief filed herein by the National Labor Relations Board. The Board on page 10 of its Brief, admits that its Order was "broadly phrased" but insists that it did not intend the Order to be broadly construed. This admission on the part of the Board, even apart from the other important considerations urged by Petitioner, supports the granting of the Writ.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 67.

J. I. CASE COMPANY, a Corporation, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR PETITIONER.

CLARK M. ROBERTSON,
JOHN C. GALL,
BEN T. REIDY,
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Counsel for Petitioner.

October 1943.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 67.

J. I. CASE COMPANY, a Corporation, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD.

BRIEF FOR PETITIONER.

MAY IT PLEASE THE COURT:

This case comes to this Court on a Writ of Certiorari directed to the United States Circuit Court of Appeals for the Seventh Circuit, that Court having entered its Decree for enforcement of the Order of the National Labor Relations Board.

Reference to Official Report of Opinion of Lower Court and Proceedings of the Board.

The opinion of the Circuit Court of Appeals (R. 57-62) is reported in 134 Fed. 2d. 70. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 9-53) are reported in 42 N. L. R. B. No. 27.

JURISDICTION.

The opinion of the Circuit Court of Appeals was filed, and its original judgment of approval with modification entered February 26, 1943 (R. 57-62). The decree of the Circuit Court of Appeals enforcing compliance with the Board order, was entered on March 17, 1943 (R. 62-64). The jurisdiction of this Court was invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and under Section 10(e) of the National Labor Relations Act, and the Petition for Writ of Certiorari was granted on June 21, 1943.*

STATUTES INVOLVED.

The pertinent provisions of the National Labor Relations Act, July 5, 1935, 49 Stat. 449, 29 U. S. C. sec. 151, *et seq.*, are

"Rights of Employees.

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

"Sec. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

"• • • •

"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives

*In the order granting the Writ of Certiorari, this Court requested that the parties in their briefs and arguments deal with the question of mootness.

of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

STATEMENT.

This proceeding involves an order of the National Labor Relations Board directing J. I. Case Company to refrain from giving effect to individual contracts of employment, or entering into any similar form of contract for any period subsequent to the date of the Board's order, and directing the Company to bargain collectively with International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C.I.O., irrespective of the individual contracts.

The case is presented upon an agreed statement of facts (R. 28-53). The facts, insofar as material to the issues presented, are as follows:

J. I. Case Company is engaged in the manufacture and distribution of farm machinery operating plants in Wisconsin, Illinois and Iowa. The plant involved in this proceeding is located at Rock Island, Illinois. This plant was acquired by J. I. Case Company and placed in operation during the year 1937 (R. 30). In the fall of 1940 the Farm Equipment Workers Organizing Committee, C.I.O., instituted representation proceedings before the National Labor Relations Board, and in an election held November 28, 1940, the employees rejected the Union as their bargaining representative (R. 46). Approximately a year later a successor Union, namely, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C.I.O., instituted similar proceedings before the National Labor Relations Board. As a result of this proceeding, an election was held on February 13, 1942. In this election a majority of the employees in the bargaining unit as found by the National Labor Relations Board, designated the last

mentioned Union for the purpose of collective bargaining (R. 33). No question is presented regarding the representation proceeding or the Certification of Representatives.

Commencing with the acquisition of the plant in 1937, J. I. Case Company had offered annually to each of its employees individually, a contract of employment, and these contracts were executed with each of approximately 75 per cent of the employees. From time to time, at the beginning of each factory year, certain of said contracts were renewed, and certain new contracts entered into. The employees executing said contracts were not necessarily the same from time to time. Certain employees executed said contracts who had not executed them during the preceding factory year, and other employees who had previously executed contracts failed to renew them. However, the percentage of contracts in effect at all times remained as above set forth. The factory year involved in this case commenced August 1, 1941, and ended July 31, 1942, and there were in effect at the time of the representation proceeding, (February 1942) 433 of such contracts of which 415 were with employees in the bargaining unit consisting of 582 employees (R. 31). The stipulation (R. 32) states:

> *"For the purposes of this stiplation the Board does not contend that the execution of said contracts was a condition of employment or that the status of individual employees was affected by reason of signing or failing to sign said contracts."* (Italics supplied.)

After the certification of the Union as collective bargaining representative, the Union requested the Works Manager at the Rock Island plant to bargain collectively with it regarding the rates of pay, wages, hours of employment, and other conditions of employment as the exclusive representative of all employees in the bargaining unit and submitted a proposed form of collective agreement. The Works Manager, in response to the Union's request, advised the Union that the Company would not deal with it in any

manner affecting the rights and obligations of the Company and its employees under the individual contracts while the contracts remained in full force and effect. He further advised the Union that the Company would deal with it on matters which did not affect the rights of the Company and the employees under the individual contracts, and upon the expiration of the individual contracts it would deal with the Union as the exclusive bargaining agency for all employees in the bargaining unit (R. 33).

The unfair labor practice charged to respondent in connection with its refusal to bargain collectively, arose out of a communication by the Company to its employees reporting to them what had taken place between the Company and the Union representatives. This letter to the employees was dated March 19, 1942, and contained the following provision quoted by the Court in its opinion (R. 58):

> "The Union has advised the Company that it will not deal with the Company except on the basis of the contract which it presented. In other words, the Union has taken the position that the Company must tear up its contracts with its individual employees and disregard the rights and obligations of its employees and of itself under those agreements. The Company believes and has been advised that the contracts for their term constitute legal and binding obligations both on the part of the Company and on the part of the employees, and that its individual employees have constitutional rights which they are entitled to have preserved and which the Company has no right to surrender."

On March 27, 1942, charges were filed with the National Labor Relations Board (R. 1-2), and on April 15, 1942, the Board issued its amended complaint (R. 2-5). The answer was filed on April 16, 1942, (R. 6-9), and on July 7, 1942, the National Labor Relations Board issued its decision and order (R. 9-56). The order directed J. I. Case Company to cease and desist from (a) giving effect to the individual contracts of employment, or entering into any similar form of contract with its employees for any period subsequent to

the date of the Board's decision, (b) refusing to bargain collectively with the Union, and (c) in any manner interfering with, restraining or coercing its employees in the exercise of their rights under the National Labor Relations Act (R. 25-26).

The Board also ordered the Company to take the following affirmative action (a) give separate written notice to each of its employees who had signed an individual contract, that the contract would not be enforced or attempted to be enforced, but that the discontinuance of the contract was without prejudice to the assertion by the employee of any right which he may have acquired thereunder, (b) upon request, to bargain collectively with the Union, (c) to post in conspicuous places in its Rock Island plant, and maintain such posting for a period of sixty days, appropriate statements of its compliance with the order, and (d) to give the usual notice to the Board of its compliance (R. 26-27).

The Court below sustained the order of the Board in all respects, with the exception of a modification of the provision enjoining in general terms the violation of the National Labor Relations Act.

SPECIFICATIONS OF ERRORS.

The Circuit Court of Appeals erred—

(1) In depriving petitioner of its rights under the Fifth Amendment to the Constitution of the United States to make individual contracts of employment with employees so desiring to contract.

(2) In affirming and approving the power and authority of the National Labor Relations Board to invalidate individual contracts valid in their terms and inception, and to perpetually enjoin the making of such contracts.

(3) In approving the order of the National Labor Relations Board that the assertion by petitioner of the continuing effectiveness of individual contracts of employment,

valid in their terms and inception, constituted an unfair labor practice within the provisions of the National Labor Relations Act.

(4) In depriving petitioner of its constitutional right of free speech to report correctly to its employees the proceedings between the Company and the Union representatives.

SUMMARY OF ARGUMENT.

1. The National Labor Relations Act does not forbid individual contracts of employment and the National Labor Relations Board is without authority to invalidate individual contracts of employment which are valid in their terms and inception and which were entered into prior to the selection of the collective bargaining representative.

2. The selection of a collective bargaining representative does not operate to supersede valid individual contracts of employment. Any such construction of the National Labor Relations Act is unwarranted by the provisions of the Act and calls into question its constitutionality.

3. The assertion by petitioner of the validity and continuing effectiveness of valid individual contracts of employment is not an unfair labor practice. Petitioner did not challenge the authority of the collective bargaining representative to deal in any manner consistent with petitioner's rights and obligations under the individual contracts.

4. The action of petitioner in correctly reporting to its employees negotiations between itself and the Union was within petitioner's constitutional right of free speech.

5. The National Labor Relations Board is without authority to perpetually enjoin the making of valid individual contracts of employment. A construction of the National Labor Relations Act which destroys the right of individual contract where collective bargaining representa-

tives have been certified is contrary to the decisions of this Court and renders the Act unconstitutional. The perpetual injunction bears no reasonable relation to the unfair labor practice found by the Board and is punitive rather than remedial.

6. Insofar as the Order of the National Labor Relations Board relates to the specific individual contracts which expired as of July 31, 1942 (prior to the enforcement proceedings in the Circuit Court of Appeals), it would appear that the issue became moot and Petitioner so advised the Circuit Court of Appeals and agrees with the position now taken by the Counsel for the National Labor Relations Board.

7. The Order of the Board perpetually enjoining petitioner from entering into individual contracts of employment is of a continuing nature involving substantive rights and is not moot.

8. The circumstances which raise the question of mootness were in existence at the time of the proceedings before the Circuit Court of Appeals and that Court was advised with respect thereto. In the event this Court should determine that the issues are moot the Decree of the Circuit Court should be reversed and the mandate direct that the Petition for Enforcement of the Board's Order be dismissed.

ARGUMENT.

Petitioner submits that the decision of the Circuit Court of Appeals is contrary to and conflicts with the decision of this Court in the case of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1. The Circuit Court of Appeals held that the *Jones & Laughlin* case was no longer authoritative on the question involved here, but was impaired, if not overruled, by other decisions of this Court. (R. 59).

The Circuit Court of Appeals stated in its opinion (R. 59):

> "Thus our rather narrow question is whether existing individual agreements with employees must yield to and be subordinate to the duty of the employer to bargain collectively with the Union as the exclusive agency, designated by law."

The Supreme Court of the United States has dealt with the validity of individual contracts which were the fruits of an unfair labor practice and which contained provisions repugnant to the Act. *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350. *National Labor Relations Board* v. *Stone*, 125 Fed. 2d, 752. (Cert. denied October 12, 1942, Case No. 200).

This is the first occasion that there has been presented to this Court the question of the continuing effectiveness of an individual contract between an employer and an employee where the contract is concededly valid in its terms and inception.

I.

The National Labor Relations Board Was Without Authority to Invalidate the Individual Contracts of Employment and to Enjoin Petitioner in Perpetuity from Entering Into Individual Contracts With Its Employees.

The National Labor Relations Act does not forbid individual contracts of employment. In the case of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, this Court held that an individual contract between an employer and an employee is sanctioned and is not forbidden by any provisions of the National Labor Relations Act. This Court in its opinion, interpreting the appropriate Section of the National Labor Relations Act, makes the following statement (pp. 44-45):

> "* * * The provisions of section 9(a) that representatives, for the purpose of collective bargaining, of the

majority of the employees in an appropriate unit shall be the exclusive representatives of all the employees in that unit, imposes upon the respondent only the duty of conferring and negotiating with the authorized representatives of its employees for the purpose of settling a labor dispute. This provision has its analogue in section 2, Ninth, of the Railway Labor Act, as amended (45 U. S. C. A. Sec. 152, subd. 9), which was under consideration in Virginian Railway Co. v. System Federation No. 40, supra. The decree which we affirmed in that case required the railway company to treat with the representative chosen by the employees and also to refrain from entering into collective labor agreements with any one other than their true representative as ascertained in accordance with the provisions of the Act. We said that the obligation to treat with the true representative was exclusive and hence imposed the negative duty to treat with no other. We also pointed out that, as conceded by the government, the injunction against the Company's entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was 'designed only to prevent collective bargaining with any one purporting to represent employees' other than the representative they had selected. It was taken 'to prohibit the negotiation of labor contracts, generally applicable to employees' in the described unit with any other representative than the one so chosen, 'but not as precluding such individual contracts' as the Company might 'elect to make directly with individual employees'. We think this construction also applies to section 9(a) of the National Labor Relations Act (29 U. S. C. A. Sec. 159(a)).

"The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine'."

It is clear from the decision of the Court—

(1) The obligation of the employer is to deal with no other *collective* bargaining representative than the one

chosen under the provisions of the Act; (2) the collective representative so chosen is the agent of all the employees in the appropriate unit for purposes of *collective* bargaining, and (3) the selection of the agent does not destroy the right of the individual principal voluntarily to execute his *individual* contract of employment.

The Circuit Court of Appeals, in its opinion, indicates that the language quoted has been rejected in subsequent opinions of the Court, or that at any rate this Court did not mean what it said in the *Jones & Laughlin* case. We have searched the decisions of this Court in vain for any statement expressly overruling or modifying the above quoted provision. We are likewise unable to find any language of this Court which by implication modifies or overrules the opinion. The only case to which the Circuit Court of Appeals makes reference in support of its statement is the case of *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350. There is no reference in that decision to the *Jones & Laughlin* case. The facts in the *National Licorice* case are entirely different. The Court was there dealing with a contract which had been found to be the fruit of an unfair labor practice forbidden by the National Labor Relations Act, and containing provisions repugnant to the Act. There is no such finding or determination in the case at bar,—in fact, the finding and determination is to the contrary.

We submit, therefore, that the decision in the *Jones & Laughlin* case remains and is effective and controlling upon the case at bar, and that the power delegated to the National Labor Relations Board pertains only to contracts repugnant to the Act or resulting from a violation of the Act.

The National Labor Relations Act was addressed to a situation existing where the employer declined to deal collectively with his employees. The preamble to the National Labor Relations Act refers to this circumstance and its resulting labor disputes, and the declared purpose of the Act

is to eliminate those disputes, by preventing the employer from creating them in the manner indicated and thus to protect the right of employees to bargain collectively, but not to require them to do so. It does not follow that the employee who wishes to deal individually may not do so, nor that, having so dealt, his contract does not have the full force and effect of any other contract, assuming, of course, that it is not otherwise objectionable. Any intent on the part of Congress to destroy this long existing right should be expressed in clear and unmistakable terms and not left to construction. It was with these rights and with this interpretation that Mr. Chief Justice Hughes was dealing in the opinion in the *Jones & Laughlin* case, and his decision was obviously predicated upon the well-established constitutional principles of freedom of contract.

It is apparent from the language of the Court in the *Jones & Laughlin* case that the Court was seeking an interpretation which would not interfere with the liberty of contract of the individual guaranteed by the Constitution and forming the basis of a long line of decisions of the courts. In reaching its conclusions the Court did not overrule in principle any one of these decisions, but held them inapplicable in view of the construction it placed upon the Act (301 U. S. 1, 45). It is apparent that if the Court had felt the Act necessitated a construction interfering with freedom of contract a different conclusion would have been reached on the constitutional question involved.

That the right to freedom of contract is not absolute but may be limited and regulated in the public interest in accordance with necessity and within constitutional limits, is, of course, well settled. But as this Court has many times pointed out, freedom of contract is the rule and restraint is the exception. *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522.

Legislatures have from time to time enacted regulations with respect to the legitimate subject matter of contracts. However, such regulation is an entirely different matter

from the complete destruction of the right of individuals, admittedly legally competent, to contract concerning their affairs.

There are many classes of persons who are treated as wards of government, or as the subject of peculiar protection. For example, limitations upon the right of contract are recognized in the case of infants and insane persons. In the instant case, however, we are dealing with persons who are in no sense declared by statute to be incompetent to manage their own affairs and make contracts with respect thereto. The position of the National Labor Relations Board is that the individuals whose contracts are here under consideration are fully competent to select collective bargaining agents and to contract through them with respect to wages, hours, and conditions of employment, but that the same individuals are prohibited from entering into voluntary individual contracts of employment directly with their employer.

There is no language in the National Labor Relations Act conferring power upon the Board to so construe the Act. It is one thing to modify, limit, or regulate contracts where they deal with a forbidden subject matter or contain provisions opposed to public policy, but it is quite a different thing to deprive an American citizen, whether employee or employer, entirely of his right and freedom to make a contract, as is done by the perpetual injunction issued in this case. Such perpetual injunction is not remedial in character, but is clearly punitive in that it bears no reasonable relation to the unfair labor practice allegedly involved. It is therefore not warranted by the provisions of the National Labor Relations Act. *Republic Steel Corp. v. National Labor Relations Board*, 311 U. S. 7.

The Circuit Court of Appeals adverts to the principle that all contracts must be assumed to be entered into with reference to the possible subsequent exercise of governmental authority, and hence concludes that the individual contracts of employment under consideration here were subject to

abrogation at any time a majority of the employees determined to bargain collectively. This conclusion was qualified both by the National Labor Relations Board and the Circuit Court of Appeals in one important respect. The contracts and the rights thereunder were upheld as to the individual employees who were parties to them but were denied as to the employer who was the other party to the same contracts. Thus, we submit, an anomalous situation is created whereby contracts admittedly valid in their inception, are left bindng upon one of the contracting parties, while the other contracting party is absolved from performance. The answer attempted by the Board and the Court is that this result is in the nature of a penalty imposed upon the employer for having mistakenly asserted the continuing validity and effectiveness of the contracts. That is to say, if the view of the Board and the Circuit Court of Appeals be sustained, if the employer had remained silent and disregarded the individual contracts, the contracts would have remained valid and enforceable as to both the employer and the employee. But because the employer communicated to the employees his view as to the legal effect of the certification by the National Labor Relations Board, the Board claimed authority under the *remedial* provisions of the National Labor Relations Act, to *penalize* the employer by holding that he could no longer assert any rights under the contracts but that his obligations under such contracts were still in full force and effect at the option of the other parties to the contracts.

If the reasoning of the Circuit Court of Appeals is to be sustained, either both parties to an individual contract of employment must be similarly affected by the selection of collective representatives, or neither of them should be—that is to say, it can not fairly be held that the employer must proceed to bargain collectively on all subjects and contract in a way which may conceivably violate his obligation to individual employees within the bargaining unit, and thereby confer upon them a right of action for breach of

contract which he himself is powerless to prevent without running the risk of being in violation of the National Labor Relations Act.

Of course, in order to reach this result it is necessary to declare that when representatives are selected for the purposes of collective bargaining, all previous agreements between the employer and the individual employee, or between the employer and other groups of employees within the same bargaining unit, are at once superseded and abrogated.* We submit that no such construction is authorized by the National Labor Relations Act.

The construction adopted by the Board and the Circuit Court of Appeals presents an interesting and important question in the field of contract law. The National Labor Relations Act was drafted on the theory that the collective bargaining representative is, as implied by the term, the agent of the employees for the purpose of collective bargaining. The employees are the principals. The principals here, or a substantial number of them, have executed valid individual contracts of employment. It is difficult to find any support in the principles of contract law for the proposition that they may avoid the obligations of their individual contracts of employment by selecting an agent for carrying on collective bargaining.

* 415 individual contracts of employment were in effect with employees in the bargaining unit of 582 employees at the time of the ballot (R. 13). 352 employees voted to select the Union as collective bargaining representative and 190 employees signified their desire not to be represented by the Union for the purpose of collective bargaining (R. 51). It is accordingly clear that all the employees having individual contracts could not have voted for collective representation and that a number of employees preferred to assert their individual contracts of employment.

II.

The Assertion by Petitioner of the Validity and Continuing Effectiveness of Individual Contracts of Employment Was Not An Unfair Labor Practice and Such Assertion, Together With Correctly Reporting to Employees Negotiations Between the Union and the Petitioner, Was Within Petitioner's Constitutional Right of Free Speech.

There is, of course, no question presented in the event petitioner was correct in its conclusion regarding the continuing effectiveness of the individual contracts of employment. This is recognized in the decision of the Circuit Court of Appeals. That Court was of the opinion that petitioner, by advising the employees that the individual contracts were still in force, committed an unfair labor practice. We do not believe that this conclusion is warranted. Petitioner cannot be said to have boldly stepped forward and asserted an interpretation of the National Labor Relations Act unsupported by authority. In fact, petitioner believed then and believes now that its interpretation was fully supported by the authority of the Supreme Court of the United States. It is difficult to see how petitioner's letter of March 19th reporting correctly the proceedings between it and the Union representatives could have affected the right of its employees to join or form a labor organization of their own choosing, inasmuch as at that time the election had taken place and a certification of the Union as collective bargaining representative had been issued by the National Labor Relations Board. This Court has zealously protected in the public interest the preservation of the right of free speech in labor matters. *Thornhill* v. *Alabama*, 310 U. S. 88.

We submit that regardless of the determination with respect to the effect of the certification of the collective bargaining representative on the individual contracts the report which petitioner made to its employees was within the constitutional guaranty and protected by the First Amend-

ment, and can not therefore be regarded as a violation of Section 8(1) of the National Labor Relations Act.

III.

Are the Issues Moot?

In its Order granting the Petition for the Writ of Certiorari, the Court requested that the parties discuss in their briefs the question of the mootness of the issues.

The Order of the National Labor Relations Board as affirmed by the Circuit Court of Appeals (R. 62-64) required Petitioner to cease and desist from

(1) *Giving Effect to the Individual Contracts of Employment.*

In its Brief before the Circuit Court of Appeals, Petitioner directed the Court's attention to the fact that the individual contracts referred to had expired on July 31, 1942, and had not been renewed or extended;

(2) *Refusing to Bargain Collectively with the Union in Respect of Rates of Pay, Wages, Hours of Employment and Other Terms and Conditions of Employment.*

Petitioner in its Brief in the Circuit Court of Appeals, directed attention to the fact that it was dealing with the Union and had dealt with the Union since July, 1942, as the exclusive collective bargaining representative of the employees in the bargaining unit and that at that same time certain issues, including wages, were before the National War Labor Board. At the present time there is in effect between the Company and the Union, an agreement arrived at through the process of collective bargaining, with the exception of certain provisions incorporated pursuant to Directive Order of the National War Labor Board.

The affirmative action required by the terms of the Board's Order as affirmed by the Court, related directly

to the two provisions of the Board's Order referred to above.

As Petitioner stated in its Reply Brief to the Brief filed by the Board in Opposition to the Petition for Writ of Certiorari (page 7), Counsel for the Board vigorously contended in the Circuit Court of Appeals that the foregoing circumstances did not render the issue moot, and no reference to this question appears in the decision of the Circuit Court of Appeals, and we call attention to the fact that the Board did not, in its Brief in opposition to the granting of the Writ of Certiorari, take the position that the issues were moot. It asserted merely that the issues were academic, *i.e.*, were of no "present practical importance".

In its Brief in Opposition to the granting of the Petition for Writ of Certiorari, the Board states:

> "Apart from the merits of the question, however, there is no occasion at the present time for a review of the provision of the Board's order requiring the cancellation of the contracts. Most of these contracts expired July 31, 1942 (R. 31) and we are advised that since the entry of the Order, petitioner has, pursuant to an order of the National War Labor Board, entered into a collective bargaining agreement superseding the individual contracts. Although this would not render the point moot, it deprives the issue as to the validity of the Board's order requiring the abrogation of the original individual contracts of present practical importance."

The record in the case itself is silent with respect to the proceedings before the National War Labor Board. However, since the proceeding has been adverted to by both parties, attention is directed to an error in the assumption of the Board in the above quotation. The Company at no time abandoned its position with respect to the continuing effect of the individual contracts of employment up to their expiration date of July 31, 1942; and the collective bargaining

contract entered into with the Union became effective after that date.*

The principles applicable to determination of the issue of mootness are clearly established by the decisions of this Court.

It is well settled that the Court will not pass on any proceeding which does not constitute a case or controversy, and that a settlement between the parties will terminate a controversy where private rights only are involved. Where, however, the controversy involves public rights, the determination of the issues is not affected by changes in circumstances due to lapse of time which would render the issue moot where private rights only were involved. *U. S.* v.

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*The actual statement regarding individual contracts made by the Company in its acceptance of the Directive Order of the National War Labor Board in its letter of August 3rd, 1942, referred to by the Board in the footnote on page 11 of its Brief, is as follows:

"INDIVIDUAL CONTRACTS

"The Company will discontinue the practice of obtaining individaul contracts.

"The report of the Panel, as adopted by the Board, stated—

'In discussing the grievance procedure the Panel has already said that it finds no necessity for including in this agreement a clause preserving to the individual the rights which he has to present grievances to the Company individually. In the same manner the Panel sees no necessity of setting forth in this contract the fact that nothing herein contained shall interfere with the right of an individual not a member of the Union to deal with the Company individually. Rights an individual may have to so deal exist and will continue to exist independently of this contract.'

"The Company has agreed to forego its constitutional right to obtain individual contracts. The Company, of course, cannot waive on behalf of any individual employee, nor should it disregard any constitutional right which the individual employee may have to make his individual contract with the Company."

The Company's acceptance was given under protest and was expressly limited to the duration of the war emergency by the terms of the letter to the National War Labor Board, above quoted.

Trans-Missouri Freight Assn., 166 U. S. 290; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission, E. H. Young* v. *Interstate Commerce Commission*, 219 U. S. 498; *Willing et al.* v. *Chicago Auditorium Assn.*, 277 U. S. 274, 289; *County of Dakota* v. *Glidden*, 113 U. S. 222; *U. S.* v. *Alaska Steamship Co.*, 253 U. S. 113; *U. S.* v. *Hamburg-American Steamship Co.*, 239 U. S. 466; and *California* v. *San Pablo & T. R. Co.*, 149 U. S. 308.

This Court has uniformly held that decisions of administrative and quasi-judicial tribunals present issues affecting public policy as declared by Congress, and that the issues involved do not become moot by change in circumstances due to lapse of time or even by compliance with the order. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission and E. H. Young*, 219 U. S. 498; *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257.

The same principles have been applied by this Court to decisions of the National Labor Relations Board. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, at page 271:

> "* * * Respondents suggest that the case has become moot by reason of the fact that since the Board made its Order it has certified the Brotherhood of Railroad Trainmen as representative of the motorbus drivers of the Pennsylvania Company for purposes of collective bargaining and that in a pending proceeding under section 9(c) for the certification of a representative of the other Pittsburgh employees, to which the Employees' Association is not a party, the Pennsylvania Company and Local Division No. 1063, who are parties, have made no objection to the proposed certification. But an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made."

On the facts in this case it is probably true that insofar as the individual contracts to which specific reference is

made in the Order of the Board and Decree of the Circuit Court of Appeals are concerned, there is no practical importance involved in considering the rights of the employees and the affirmative action required regarding the contracts which expired July 31, 1942. Counsel for Petitioner expressed this view in the Circuit Court of Appeals and this view is now apparently concurred in by the attorneys for the Board.

The Board's Order as affirmed by the Circuit Court of Appeals, enjoins Petitioner in perpetuity from entering into individual contracts of employment. With respect to this portion of the Order of the Board, Petitioner in its Brief in the Circuit Court of Appeals stated its position to be (pp. 6 and 7):

> "Respondent asserts and has asserted its right to enter into individual contracts of employment with employees desiring to make such contracts, where such contracts are not a condition of employment and are freely and voluntarily entered into by the employee, and do not contain provisions repugnant to the National Labor Relations Act, and are not entered into for the purpose of interfering with, restraining or coercing its employees in the exercise of their rights under the Act."

Counsel for the Board, on page 10 of its Brief filed in Opposition to the Petition for Writ of Certiorari, makes the following statement:

> "The prohibition against entering into similar forms of contracts in the future, though broadly phrased, was intended only to preclude petitioner from deriving any benefits from the contracts thus utilized and from utilizing similar contracts under similar circumstances in the future, not to prevent petitioner from lawfully contracting with employees individually, under circumstances which negative any intent to interfere with their rights."

If, by this statement, Counsel for the Board intend to concur in the assertion made by Petitioner regarding the right

of individual contract in the future, then we must agree that the case has become one for appropriate amendment of the Decree of the Circuit Court of Appeals rather than a controversy requiring determination by this Court.

If, on the other hand, the Board by its statement contends that the assertion by Petitioner of the continuing validity and effectiveness of the individual contracts of employment would constitute an unfair labor practice within the provisions of the National Labor Relatons Act, then it is submitted that a controversy is presented for the consideration of this Court and that the issue with respect thereto is neither moot nor abstract.

If the National Labor Relations Board is correct in its apparent position that the issues herein are of no "present practical importance" and have thus become moot, it is equally true that such condition existed when the matter was before the Circuit Court of Appeals, and that Court should not have entertained jurisdiction of the Petition for Enforcement; and its Decree should be reversed and set aside. *South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.*, 145 U. S. 300, 302; *U. S.* v. *Hamburg-American Steamship Co.*, 239 U. S. 466, 477, 478; *Brownlow* v. *Schwartz*, 261 U. S. 216, 218, 219; *Heitmuller* v. *Stokes*, 256 U. S. 359, 362.

CONCLUSION.

In conclusion, we submit that the opinion of this Court in the *Jones & Laughlin* case remains unreversed and unmodified and that the Circuit Court of Appeals was in error in holding otherwise. Any other conclusion presents an important question for the reconsideration of this Court as to the constitutionality of the National Labor Relations Act itself. In the *Jones & Laughlin* case this Court reviewed the various substantial grounds which were urged upon it in support of the view that the statute was unconstitutional. One of those grounds was that the statute necessarily destroyed individual contract rights and thus was in conflict

with the Fifth Amendment to the Constitution of the United States. This Court upheld the constitutionality of the National Labor Relations Act and one of the express grounds on which it did so was its conclusion that the statute did not by its terms impair the right of individual contract or authorize the National Labor Relations Board to do so. If it now be held that the statute *does* impair or destroy these basic constitutional rights or *does* authorize the National Labor Relations Board to accomplish that result, then, we submit, the validity of the National Labor Relations Act is again drawn in question and should be determined by the Court in the light of this new construction.

Respectfully submitted,

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HOWARD R. JOHNSON,
Counsel for Petitioner.

October 1943.

[illegible]

[illegible]

[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 67.

J. I. CASE COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR PETITIONER TO BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD.

INTRODUCTORY STATEMENT.

Respondent, National Labor Relations Board, has filed herein its brief setting forth at length the grounds upon which it asks the Court to affirm the decision of the United States Circuit Court of Appeals for the Seventh Circuit. The purpose of this reply brief is to invite the Court's attention to certain statements made and arguments advanced

by the Board. For convenience, the matters presented in this reply brief will be in the order in which they appear in the brief filed on behalf of the National Labor Relations Board.

QUESTIONS PRESENTED.

1. It will be noted that the National Labor Relations Board now agrees with the position of Petitioner—that the issues in this case are not moot but should be decided by the Court.

2. Question No. 2 as stated by the Board on page 2 of its brief is as follows:

> "Whether, after the Board has certified an exclusive collective bargaining representative, an employer may refuse to bargain collectively with respect to the terms and conditions of employment covered by individual contracts theretofore executed with a majority of its employees."

Petitioner calls attention to the fact that the question so stated implies that Petitioner did refuse to bargain collectively with respect to the terms and conditions of employment covered by individual contracts; but, in fact, the Board does not contend nor does the record show, that any request was specifically made to the employer at any time to bargain collectively with respect to the individual contracts. The demand for collective bargaining made upon Petitioner following certification of the Union as the bargaining agency was without reference to the individual contracts, and at no time did the collective bargaining agent in any way recognize the existence of such individual contracts of employment. The demand upon Petitioner was to bargain without regard to such contracts.

ARGUMENT.

The Board's brief narrows the essential issue before the Court. The Board now contends that the National Labor Relations Act "evidences the Congressional intent to supersede individual by collective bargaining." (Brief, 23) For the Court to sustain the order of the Board in the present proceeding, it would indeed be necessary to adopt that view regarding the effect of the National Labor Relations Act upon individual contracts of employment. The Court is, therefore, faced with the necessity of either reaffirming its decision in *N. L. R. B.* v. *Jones & Laughlin Steel Corporation* (301 U. S. 1) upholding the right of individual contract, or of overruling that decision and adopting the Board's contention that there is no such thing as a right of individual contract where a collective bargaining agent has been chosen.

The Board urges several apparently inconsistent positions in its brief. It asserts that the National Labor Relations Act evidences the Congressional intent to supersede individual by collective bargaining and that when a majority of the employees in an appropriate bargaining unit have selected a collective bargaining agent, the right of individual contract by employees in that unit is automatically terminated; but its order in the present proceeding does not treat individual contracts as completely abrogated. The order undertakes merely to relieve one party to the individual agreements of any obligations under them, but to hold the other party liable in all respects for discharge of its obligations under the contracts. (Record, 26)

The Board's attempted interpretation of the language used by this Court in the *Jones & Laughlin* case with respect to the right of individual contract is extremely interesting. The Board construes the language as meaning that the selection of a collective bargaining agent under the National Labor Relations Act automatically terminates all right of individual bargaining by employees within the unit,

but that the collective bargaining agent may, if it so desires, "* * allow individuals within the unit to bargain individually respecting matters peculiarly of concern to them" (Brief, 27). That is to say—the Board maintains that although the right of individual bargaining is extinguished when a collective bargaining agent has been selected, such right of individual bargaining may be revived by permission of the bargaining agent. It is indeed a peculiar construction of the language in the *Jones & Laughlin* case to say that the Court intended any such result. We cannot believe that the Court intended to adopt the view that the right of individual bargaining is extinguished merely because a majority of employes within the bargaining unit elect to bargain collectively. Neither can we conceive that the Court intended to recognize in the bargaining agent so chosen a right to withhold from or to confer upon employees within the unit the privilege of bargaining individually.

This Court, in the *Jones & Laughlin* case, was speaking of rights which employees had before the National Labor Relations Act was passed, and which the Court said the Act in no way destroyed. The Court was aware that if the statute should be construed to deprive employers and individual employees of the right to enter into employment contracts during the existence of a collective bargaining representative, its Constitutionality would be in doubt. The language used by the Court shows that the Court sought an interpretation of the statute which would not interfere with an individual's right of contract guaranteed by the Constitution. The Board, however, here urges a construction of the law which would destroy that right, or at least suspend it during the existence of a collective bargaining representative.

The Board quotes with approval, on page 59 of its brief, a statement attributed to Thomas N. Carver to the following effect:

> "The fundamental principle involved in the trade-union policy of the present is the substitution of the

indispensable group as a bargaining unit for the *dispensable individual.*" (Italics supplied)

For the Court to sustain the view of the Board as urged in its brief, it would be necessary to adopt the philosophy so stated—namely, that the group is indispensable, the individual dispensable, and that the latter has no rights which can be maintained in the face of collective action by others. The Board maintains that "Congress had in mind, not a mere disparity in strength between the individual employee and his employer, but rather a complete incapacity of the employee to participate in the process of realistic negotiations with his employer" (Brief, 20). If Congress had this in mind it failed to disclose it in the specific language of the National Labor Relations Act and this Court apparently failed to discover such Congressional intention when it was considering the right of individual contract in the *Jones & Laughlin* case. And the Board is obviously inconsistent when it refers to the incapacity of the employee to contract with his employer but insists upon his capacity to select an agent for the purposes of collective bargaining.

Furthermore, this Court has had occasion, since the passage of the National Labor Relations Act and the decision in *Jones & Laughlin*, to consider and uphold specifically not only the capacity but the right of an employee to make an individual contract with respect to his wages and hours. (*Walling* v. *A. H. Belo Corp.*, 316 U. S. 624.)

Moreover, the Board has conceded the capacity of the individual employees to contract with *this* employer with respect to wages, hours and working conditions. The Board does not contend, and has never contended, that the individual employment contracts made between Petitioner and its employees were invalid in their inception. It is therefore difficult to see how the Board, having conceded the validity of those contracts in their inception, can still maintain that all of the employees in the bargaining unit became legally incapable of contracting individually when a

majority of the employees in the unit elected to deal collectively with the employer.

The Board argues that the effect of the position taken by the Petitioner is to deprive the employees who had individual contracts of employment of their right to bargain collectively regarding terms and conditions of employment included in such contracts, and refers in support of its position to a line of cases holding that the existence of a collective bargaining agreement does not prevent the collective bargaining agent from negotiating changes in such an agreement, and which impose upon the employer the duty to bargain with the chosen representative regarding such changes (Brief 33-36). In advancing this proposition the Board entirely misconstrues the position of the Petitioner. At no stage of the proceedings did the Petitioner contend that the employees holding such individual contracts could not bargain respecting changes in their contracts. This issue was not presented. The Union's position was clear that the individual contracts were of no effect or validity and thus were not entitled to recognition for any purpose. As Petitioner stated in its brief in the Circuit Court of Appeals, the employees could negotiate changes in their individual contracts of employment, either individually or collectively, but since the contracts were validly made with individuals the Petitioner, of necessity, would have to know the particular contracts in which changes were sought. Manifestly, the collective representative could not negotiate changes in such individual contracts unless it specified the contracts which it sought to change. And we have pointed out in our brief (page 15) that on the basis of the result of the ballot, all of the employees having individual contracts of employment could not have voted for the collective representative and that a number of employees obviously preferred to assert their individual contracts of employment.

The Board also states in its brief that the Petitioner's position is analogous to those cases wherein by contract

the employee agrees not to bargain collectively or associate with others for that purpose, thus seeking to bring the case within the rule of *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350. In answer to this, Petitioner states that it has at no time in this proceeding or subsequent to the election held under the auspices of the Board, denied in any way the existence of the Union as the collective bargaining representative of the employees, nor has it asserted any legal flaw in the selection of the collective bargaining representative by reason of the existence of the individual contracts. Petitioner's sole contention is that the individual contracts, concededly valid, must be accepted as such in connection with the collective bargaining process.

The Board undertakes to place Petitioner in the position of contending that the right of individual contract is an absolute right which may be exercised under any and all conditions and for any and all purposes (Brief, 41). This is *not* the position of Petitioner because it recognizes that the right of individual contract, like all other rights, is relative, not absolute.

There appears to be no difference between Petitioner and the Board with respect to the existence of a right of individual contract, where the contract is valid in its inception and contains no provisions repugnant to the National Labor Relations Act (Brief, 48, 49). That being true, it is difficult to understand why the Board cites as authority for its present position the line of cases in which the right of individual contract has been limited because the contracts were invalid or were utilized for the purpose of defeating the statutory purpose. The Board has never contended, and does not now contend, that the individual contracts made between Petitioner and its employees were invalid, either because of the conditions under which they were made or because of provisions in such contracts repugnant to the Act. In other words, although Petitioner recognizes as fully as does the Board that the right of individual contract is not an unlimited right, it maintains, and the Board does not deny, that the right was lawfully exercised in the

present instance. Petitioner submits that the conditions which would justify a limitation on the right of individual contract and which have prompted the courts in the cases cited by the Board (Brief, 34, 35) to decline to give effect to individual contracts, do not exist here.

To summarize, Petitioner's contention is that the individual contracts here involved were valid in their inception and in their terms; that they did not undertake to preclude subsequent collective bargaining; that Petitioner did not use said contracts for the purpose of frustrating any rights secured by the National Labor Relations Act; and that there is no basis for declining to give effect to such contracts unless the Board is correct in its contention that such contracts are automatically vitiated when a bargaining agent duly designated by a majority of employees in the bargaining unit demands collective bargaining.

The Board contends that its order does not deprive Petitioner and its individual employees from entering into individual contracts of employment except where the purpose is to utilize them, or where the probable consequence would be their utilization, for "infringement of the collective bargaining process" (Brief, 48, 49). However, since the record shows that the contracts here under consideration were not entered into for such improper purpose and were not utilized for the "infringement of the collective bargaining process," it is difficult to conclude that the Board's order in fact recognizes any future right of individual contract between Petitioner and its employees. The right is, to say the least, illusory, if it can only be exercised under peril of another proceeding and order similar to the present one.

Respectfully submitted,

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December, 1943.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1039

J. I. CASE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 57–62) is reported in 134 F. (2d) 70. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 9–28) are reported in 42 N. L. R. B. 85. The decisions of the Board in a prior representation case which forms a part of the record in this case are reported in 38 N. L. R. B. 522 and 39 N. L. R. B. 412.

JURISDICTION

The decree of the circuit court of appeals was entered March 17, 1943 (R. 62–64). The peti-

tion for writ of certiorari was filed on May 21, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the existence of agreements with individual employees exempts an employer from the duty to bargain collectively, under Sections 8 (5) and 9 (a) of the Act, with respect to terms of employment covered by such agreements, after a majority of the employees have selected a collective bargaining representative.

2. Whether the Board may order an employer to cease and desist from giving effect to individual contracts of employment, valid in origin, where the employer has utilized the contracts to interfere with his employees' rights under the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 13–15.

STATEMENT

After appropriate proceedings, in which all material facts were stipulated by the parties, the Board issued its findings of fact, conclusions of

law, and order (R. 9–28). The undisputed findings may be summarized as follows:

Since 1937, petitioner has annually offered, to the employees of its Rock Island plant, individual contracts fixing terms of employment for a year. These contracts contain, *inter alia*, the following provisions: Petitioner agrees to furnish employment as steadily as conditions permit and to pay a specified rate to the contracting employee, reserving, however, the right to determine new rates in the event the employee's job is changed. The employee agrees to accept the terms provided, and "to faithfully and honestly serve" petitioner for the term of the contract. At all times since 1937, about 75 percent of the employees were signatories to such contracts (R. 18–19).

On November 7, 1941, while the individual contracts executed August 1, 1941, were still in effect, the Union [1] petitioned the Board for certification as the exclusive bargaining representative of the production and maintenance employees in the plant (R. 18–19). On December 17, a hearing was held (R. 19). The same day, the Company sent a circular letter to its employees, informing them of the proceedings and recalling that in a previous proceeding the employees had rejected the Union's predecessor. The letter set forth the Company's assertion at the hearing that the indi-

[1] International Union, Automobile, Aircraft, and Agricultural Implement Workers of America, C. I. O.

vidual agreements were a bar to the designation of the Union as the exclusive bargaining representative of the employees (R. 19–20, 46–48).

The Board rejected this contention, and on February 13, 1942, held an election in which 352 votes were cast for the Union and 190 against. Accordingly, on March 3, it certified the Union as the exclusive bargaining representative of the employees in question, in respect to wages, hours, and other conditions of employment (39 N. L. R. B. 412).[2]

On March 7, the Union asked petitioner to bargain collectively with it as such exclusive representative. Petitioner refused. It expressed willingness, however, to bargain as to matters not covered by the individual agreements, and to bargain as to all matters, after the expiration of the agreements (R. 18). On March 19, petitioner, by individual letters, informed each of its employees of the position it had taken with respect to the Union's request (R. 20, 51–53).

Upon the foregoing facts the Board concluded (R. 23) that petitioner had failed to bargain collectively as required by the statute. It found further that the circular letters of December 17, 1941, and March 19, 1942, were intended by petitioner to divert the employees from further sup-

[2] Petitioner does not dispute the appropriateness of the bargaining unit fixed by the Board, or the Union's designation by a majority within that unit on and after February 13, 1942 (R. 32–33).

port of the Union and that petitioner had thereby utilized the contracts to interfere with and impede the self-organization of its employees. Upon these findings, the Board ordered petitioner (R. 25–27) to cease and desist from its unfair labor practices and to bargain collectively with the Union. It further directed petitioner to cease and desist from giving effect to the individual contracts or entering into similar contracts, and to notify the signatory employees that the contracts would not be enforced, that the said employees would not be expected to deal with petitioner individually by virtue of the contracts, and that the discontinuance of the contracts was without prejudice to the assertion of any legal rights the employees might have acquired thereunder.

On November 2, 1942, the Board filed its petition for enforcement in the court below (R. 53–56), and on February 26, 1943, the court handed down its opinion enforcing the Board's order, with a modification as to the scope of the cease-and-desist provision (R. 57–62). An appropriate decree was entered on March 17 (R. 62–64).

ARGUMENT

1. Petitioner does not deny that, except for the incidence of the individual agreements, it was obligated, at all times after February 13, 1942, to bargain with the Union as the exclusive representative of its employees, with respect to wages, hours, and other conditions of employment (R. 32–33). It contends, however, that by having en-

tered into agreements with individual employees, it had automatically exempted itself, for the duration of such agreements, from its duty to bargain collectively with respect to matters covered therein. This contention was properly rejected by the court below.

The duty to bargain collectively is imposed by the Act without limitation (Sections 8 (5) and 9 (a), *infra*, p. 15). The field of prescribed bargaining is therein defined as "rates of pay, wages, hours of employment, or other conditions of employment" and an unqualified and unconditional obligation is imposed upon the employer to bargain in that field, once a request is made by the statutory representative. The interpretation urged by petitioner, which reduces the scope of this obligation by the extent to which the employer can procure individual agreements beforehand, is precluded by the unambiguous terms of these provisions. It is moreover incompatible with the legislative findings set forth in Section 1 of the Act (*infra*, p. 13), in which Congress explicitly recognizes, as this Court has itself repeatedly declared, that the gross inequality of bargaining power between employers and individual employees makes it necessary for the latter to act in concert

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[3] *Holden* v. *Hardy*, 169 U. S. 366, 397; *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 209; *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33–34; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 263–264. See also the legislative findings in the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C., Sec. 102.

in order to obtain fair terms of employment. To accept petitioner's interpretation it is necessary to believe that Congress, while finding the individual employee incapable of reaching a fair bargain without collective action, nevertheless deemed him capable of bargaining away, at the threshold, his statutory right to collective bargaining. This is to construe the Act so as to permit the "practice and procedure of collective bargaining," which it seeks to encourage, to be obstructed by the very practices and procedures which it seeks to supplant (Section 1).

Contrary to petitioner's contention, the decisions below do not hold that the obligation which the Act placed upon the employer to bargain collectively automatically nullified the provisions of the individual-contracts upon the choice of a bargaining agent by the employees. The contracts remained in effect until superseded by a collective agreement or cancelled as a result of an order of the Board. But the employer was required to deal in good faith with the newly chosen representative as the authorized agent of the employees, and to bargain with the representative with respect to changing the agreement if requested.[1] If the employer and the representative agreed upon different

[1] It should be noted that the existence of even a collective agreement does not relieve an employer from the obligation to bargain collectively concerning matters covered in the agreement. *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342; *Rapid Roller Co.* v. *National Labor Relations Board*, 126 F. (2d) 452, 459 (C. C. A. 7), cert. de-

terms of employment, they could modify or supersede the earlier individual agreements, just as any two contracting parties have a right to supplement, modify, or cancel an earlier agreement. The power of the negotiators to supersede agreements made by the employees individually is obviously not lessened by the fact that the employees are acting through an agent or representative rather than in person. It is thus apparent that the existence of preexisting contracts between petitioner and individual employees did not excuse petitioner from bargaining collectively with the representative selected by the employees and certified by the Board.

This conclusion is compelled by *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, in which this Court held that employers may not include in individual contracts with employees clauses imposing restraints upon "the employees' rights to organize and bargain collectively" (309 U. S., at 360).[5] In the instant case

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nied, 317 U. S. 650; *National Labor Relations Board* v. *Newark Morning Ledger Co.*, 120 F. (2d) 262, 267 (C. C. A. 3), cert. denied, 314 U. S. 693. It is plainly idle to argue that an individual bargain relieves an employer, for the period of the agreement, of the duty to bargain collectively, when not even a collective bargain with the statutory representative can do so.

[5] Other provisions in individual contracts held to foreclose or limit future collective bargaining were similarly held invalid in *National Labor Relations Board* v. *Superior Tanning Co.*, 117 F. (2d) 881, 891–892 (C. C. A. 7), cert. denied, 313 U. S. 559; *National Labor Relations Board* v. *Stone*, 117 F. (2d) 752, 756 (C. C. A. 7), cert. denied, 317 U. S. 649; *National Labor Relations Board* v. *Vincennes Steel Corp.*, 117 F. (2d) 169, 172–173 (C. C. A. 7). Petitioner seeks to

petitioner is seeking to give contracts which contained no such provision the very effect which the *National Licorice* case held could not be provided for expressly.

Petitioner's position finds no support in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 41–45, which petitioner claims to be in conflict with the decision below. Although that case indicated that individual contracts may in some circumstances be permissible, it did not hold that an employer is justified in refusing to bargain with the representative of the employees because of the existence of such contracts. Cf. *National Licorice Co.* v. *National Labor Relations Board, supra.* As the *Jones and Laughlin* opinion points out, the Act does not compel an agreement, and room is left for valid individual agreements on all matters on which the employer and the statutory representative cannot or do not agree.

2. The Board ordered petitioner to cease giving effect to the individual contracts or any "modification, continuation, extension, or renewal thereof" or from "entering into any similar form of contract * * * subsequent to the date" of its decision (R. 25). This provision of the order was not predicated upon any inherent illegality in the contracts themselves, but upon their use by

distinguish these cases (Pet. 8) on the ground that coercive influence was present in the execution of the contracts there involved. The point is, however, explicitly made in each of the opinions that the clauses restricting collective bargaining were in themselves illegal apart from any aspects of coercion.

petitioner as justification for its refusal to bargain collectively. The prohibition against entering into similar forms of contracts in the future, though broadly phrased, was intended only to preclude petitioner from deriving any benefits from the contracts thus utilized and from utilizing similar contracts under similar circumstances in the future, not to prevent petitioner from lawfully contracting with employees individually, under circumstances which negative any intent to interfere with their rights. That this was the construction which the Board placed upon its order was specifically stated in the Board's brief in the Circuit Court of Appeals.[6]

The Board concluded that petitioner "has utilized the individual contracts as a means of thwarting the rights of its employees under the Act" (R. 24), and ordered petitioner to refrain from enforcing the contracts in order to remove an obstacle to the full effectuation of the policies of the Act. The Board found (R. 23) that petitioner's circular communications to its employees, dated December 17, 1941, and March 19, 1942, were intended to divert the employees from continued support of the Union by advising them of its refusal to deal fully with the Union because of the existence of the agreements. The court below, we believe, properly upheld these findings.

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[6] See Board's Reply Brief, pp. 10–11.

[7] Petitioner objects to the provision in the order that discontinuance of the contracts be "without prejudice to the

Apart from the merits of the question, however, there is no occasion at the present time for a review of the provision of the Board's order requiring the cancellation of the contracts. Most of these contracts expired July 31, 1942 (R. 31), and we are advised that since the entry of the order, petitioner has, pursuant to an order of the National War Labor Board,[8] entered into a collective-bargaining agreement superseding the individual contracts. Although this would not render the point moot, it deprives the issue as to the validity of the Board's order requiring the abrogation of the original individual contracts of present practical importance.[9] Whatever question there might

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assertion of any legal rights the employee may have acquired under such contract" (R. 26). This Court, in *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, at 367, modified the Board's order in that case so as to add an identical provision, and the clause in question has been included in subsequent orders in deference to this Court's decision.

[8] National War Labor Board Case, No. 130, *In the Matter of J. I. Case Co.*, decided July 22, 1942, 10 Labor Relations Reporter 721. By letter of August 3, 1942, the company manifested its intention to comply with this order, for the duration of the war, although without prejudice to any of its legal rights.

[9] In *National Labor Relations Board* v. *Goodyear Tire and Rubber Co.*, No. 557, this Term, the Board dismissed its petition for certiorari in similar circumstances.

The statement by petitioner in its letter to the National War Labor Board that compliance with that Board's order was not to be deemed a waiver of petitioner's legal rights does not, of course, prevent this Court from taking into account the abrogation of the original individual agreements in determining whether the question as to whether the Board

have been as to the right of the employer with respect to the individual contracts still in effect at the time of the choice of a collective-bargaining representative, the Board undoubtedly has power, particularly in view of petitioner's use of the agreements as an excuse for avoiding collective bargaining, to prevent their extension or renewal or remaking after a collective-bargaining representative had been chosen by a majority of the employees and certified by the Board.

CONCLUSION

The decision below is correct and presents no conflict of decisions. The petition should, therefore, be denied.

Respectfully submitted.

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JUNE 1943.

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had power to order their cancellation is sufficiently important at the present time to warrant the granting of certiorari.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1937, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*), are as follows:

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the rights to employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized

sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own chosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9 (a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 67

J. I. CASE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 57–62) is reported in 134 F. (2d) 70. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 9–28) are reported in 42 N. L. R. B. 85. The decisions of the Board in a prior representation case which forms a part of the record in this case are reported in 38 N. L. R. B. 522 and 39 N. L. R. B. 412.

JURISDICTION

The decree of the circuit court of appeals was entered on March 17, 1943 (R. 62–64). The petition for a writ of certiorari was filed on May 21, 1943, and was granted on June 21, 1943. The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1935, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Board's order, requiring petitioner to cease and desist from its unfair labor practices, to bargain collectively with the union, and to cease from giving effect to its individual contracts and from entering into similar forms of contracts, became moot upon the expiration of the contracts and upon petitioner's entry into a collective bargaining contract.

2. Whether, after the Board has certified an exclusive collective bargaining representative, an employer may refuse to bargain collectively with respect to the terms and conditions of employment covered by individual contracts theretofore executed with a majority of its employees.

3. Whether, when an employer has utilized individual contracts of employment, valid in origin, to interfere with its employees' rights under the Act, the Board may order the employer to cease and desist from giving effect to such contracts and from entering into similar contracts.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are set forth in Appendix A, *infra*, pp. 51–55.

STATEMENT

After appropriate proceedings, in which all material facts were stipulated by the parties, the Board issued its findings of fact, conclusions of law, and order (R. 9–28). The undisputed findings may be summarized as follows:

Since 1937, petitioner has annually offered its employees at its Rock Island plant individual contracts fixing terms of employment for a year (R. 18–19, 30–31). These contracts contain among others the following provisions: Petitioner agrees to furnish employment as steadily as conditions permit and to pay a specified rate to the contracting employee, reserving, however, the right to determine new rates in the event the employee's job is changed. The employee agrees to accept the terms provided, to comply with petitioner's factory rules,[1] and "to faithfully and honestly serve" petitioner for the term of the contract. (R. 19, 34–36). At all times since 1937, about 75 percent of the employees were parties to such contracts (R. 18–19, 31).

On November 7, 1941, while the individual contracts executed August 1, 1941, were still in effect,

[1] The rules provide that "working hours will be announced by appropriate notices on company bulletin boards or by the foreman" (R. 39); state that the company has adopted a vacation plan, an explanation of which has been published and is available to employees (R. 44); and describe in detail the manner in which employees are hired, the safety rules to be followed, and procedures observed at the plant (R. 36–45).

the Union[2] petitioned the Board for certification as the exclusive bargaining representative of the production and maintenance employees in the plant (R. 17–18). On December 17, a hearing was held (R. 19) at which the company contended that the contracts were a bar to the proceedings because (1) their existence precluded a question concerning representation and (2) their continued effectiveness until July 31, 1942, made such proceedings premature and untimely (Transcript in representation hearings, p. 11).

On the same day, the company sent a circular letter to its employees informing them of the proceedings and recalling that in a previous proceeding (27 N. L. R. B. 1202, 36 N. L. R. B. 614) the employees had rejected the Union's predecessor. The circular announced also that the company had requested the Board to dismiss the petition "on the ground that the company does not believe that any action should affect its rights and the rights of its employees who have signed individual contracts and indicated that they wish to bargain with the company on that basis" (R. 19–20, 31, 46–48).[2a]

[2] International Union, Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O.

[2a] The Board had already ruled in prior proceedings involving a unit composed of the pattern makers at petitioner's Rock Island plant that the individual contracts were not a bar to an election (24 N. L. R. B. 606, 608) and, after the Pattern Makers League received a majority of the votes in the election, had certified it (25 N. L. R. B. 504).

On January 26, the Board issued its Decision and Direction of Election (38 N. L. R. B. 522), rejecting the company's contention and citing its earlier opinion in *Matter of The Gates Rubber Co.* (8 N. L. R. B. 303, 306) which held: "The fact that an employee signs an individual contract cannot be held to reflect the desires of such employee regarding representation and does not constitute any bar to collective bargaining on his behalf."

Pursuant to the Board's direction, an election was held among the company's employees on February 13, 1942; 342 votes were cast for the Union and 190 against. Accordingly, on March 3, the Board certified the Union as the exclusive bargaining representative of the employees in question in respect to wages, hours, and other conditions of employment (39 N. L. R. B. 412).[3]

On March 7, 1942, the Union asked petitioner to bargain collectively with it as such exclusive representative. Petitioner, in the words of the stipulation, "refuse[d] to negotiate with the Union as the exclusive representative of all the employees in the unit with respect to rates of pay, hours of employment or other conditions of employment, declaring that [petitioner] could not deal with the Union in any manner affecting

[3] Petitioner does not dispute the appropriateness of the bargaining unit fixed by the Board or the Union's designation by a majority within that unit on and after February 13, 1942 (R. 32–33).

the rights and obligations of [petitioner] and its employees under the individual contracts while the contracts remained in full force and effect." Petitioner stated further that it "would deal with the Union on matters which did not affect the rights of [petitioner] and the employees under the individual contracts, and that it would deal with the Union as the exclusive bargaining agency for all employees in the unit on matters relating to hours, wages, and conditions of employment upon expiration of the individual contracts." (R. 15, 33.)

On March 19, 1942, petitioner again sent a circular letter to each of its employees. It asserted therein that the "validity [of the individual agreements] is not affected by the result of the ballot [in the Board election]." It informed the employees that when the Union representatives "presented a collective bargaining contract for all employees, they were advised that the company could not deal with the Union in any manner which affected the rights and obligations of the company and its employees under the individual contracts while these contracts were in existence." (R. 19–20, 31, 52.)

Upon the foregoing facts the Board found that petitioner had failed to bargain collectively as required by Section 8 (5) of the Act. It held (R. 21–22):

> The duty [to bargain collectively] is necessarily paramount to the freedom of con-

tract which the employer may have enjoyed prior to the enactment of the statute or before the collective agent has been chosen. Until such representative is designated, the employer may, of course, deal individually with his employees concerning any aspect of the employment relationship so long as he does not exact terms repugnant to the Act and does not offer the contracts for the purpose of infringing rights under the Act. The employee is not, however, presumed thereby to have surrendered his right to collective bargaining during the period of his individual agreement. The right and its correlative duty are merely in abeyance pending the choice of a collective agent. When once a majority of the employees have exercised their right to choose a representative for concerted bargaining in an appropriate unit, the employer's statutory obligation to deal exclusively with such representative as to all terms and conditions of employment is immediate and unconditional and its performance may not be deferred or qualified by reason of any individual bargain which he may have made with his employees. Nor may the employer, contrary to the Board's determination, limit the bargaining unit to the noncontracting employees and thereby arrogate to himself a power lodged exclusively in the Board. Any attempt by the employer to curtail the collective agent's power or to compel individual bargaining

under the contracts constitutes an obstruction to the rights guaranteed by the Act. The Board accordingly concluded that petitioner "by insisting that those who signed contracts wish to bargain on an individual basis and by refusing to deal with the Union with respect to terms and conditions covered by the individual contracts, has failed to bargain collectively within the meaning of the Act" (R. 23).

The Board also found that the circular letters of December 17, 1941, and March 19, 1942, were intended by petitioner to divert the employees from further support of the Union by advising them that petitioner would refuse to deal with the Union as their full statutory agent (R. 23). The Board concluded that petitioner, by setting these contracts up as an excuse for not bargaining collectively and by so notifying its employees, had utilized the contracts to interfere with and impede the self-organization of its employees in violation of Section 8 (1) of the Act (R. 23).

Upon these findings, the Board ordered petitioner to cease and desist from its unfair labor practices and to bargain collectively with the Union. Because the contracts had been utilized to interfere with the employees under the Act, and since the Board "consider[ed] such contracts to constitute a continuing obstacle to the full exercise of the right to collective bargaining," the Board further directed petitioner to

cease and desist from giving effect to the individual contracts or entering into similar forms of contract, and to notify the signatory employees that the contracts would not be enforced, that the said employees would not be expected to deal with petitioner individually by virtue of the contracts, and that the discontinuance of the contracts was without prejudice to the assertion of any legal rights the employees might have acquired thereunder (R. 25–27).

On November 2, 1942, the Board filed its petition for enforcement in the court below (R. 53–56), and on February 26, 1943, the court handed down its opinion enforcing the Board's order, with a modification as to the scope of the cease-and-desist provision (R. 57–62). An appropriate decree was entered on March 17, 1943 (R. 62–64).

SUMMARY OF ARGUMENT

1. The case is not moot. Both the Board and the court ordered petitioner to cease and desist from its unfair labor practices, not to enter into similar forms of contract in the future, and upon request to bargain collectively with the Union. Thus, notwithstanding the expiration of the individual contracts, a continuing order is in effect which governs certain aspects of petitioner's future conduct. The case is indistinguishable from *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257.

2. The obligation "to bargain collectively" includes the obligation to recognize the exclusive

bargaining representative as having the power to represent all employees in the unit and agree with the employer respecting all terms and conditions of employment. The recognition which the employer must accord the exclusive bargaining representative requires that the employer treat with that representative, admitting that its employees will be bound by a contract thus collectively negotiated and that such contract will supersede any individual contracts theretofore made and preclude the making of any individual contracts during the term thereof. This meaning of the term is supported by the words of the statute, its legislative history, the definitions placed thereon by economists and experts in labor relations, and by the uniform decisions of the Board and the courts interpreting the Act. In refusing to negotiate with the Union respecting the terms and conditions of employment covered by individual contracts with a majority of employees in the unit petitioner refused to bargain collectively.

The statutory duty to bargain collectively cannot be suspended by private contracts between the employer and his employees. The premise upon which the Act is based, as shown by its stated purpose and legislative history, is that the individual employee is unable to bargain with his employer on equal terms. To remedy that inequality, the Act makes it the duty of the employer to bargain collectively with his employees through their chosen representative. If the employer by

individual contracts with his employees could suspend this duty for the duration of the contracts he could restore the very inequality which the Act was designed to overcome.

Therefore there is no impropriety in giving effect to the statute, which states no exception to the employer's statutory duty to bargain collectively with the employees' chosen bargaining agent. The court decisions, including those of this Court, support this construction and remove the constitutional doubts expressed by petitioner. Consequently the petitioner was not justified in refusing to bargain collectively during the life of the individual contracts, and that refusal was, as the Board found, an unfair labor practice.

3. The remedies selected by the Board were appropriate to remove the effects of this unfair labor practice. The Board had a basis in the evidence for its judgment that the contracts presented a barrier to the collective bargaining contemplated by the Act; this in turn was a basis for the judgment that petitioner must be prevented from enforcing the contracts or making similar new ones.

Even in the absence of the Board order, petitioner would not be justified, in the presence of the collective bargaining agent, in offering its employees individual contracts covering terms of employment. Both the legislative history of the Act and judicial authority show that such activity would constitute an unfair labor practice since it

would be an attempt to bypass the collective bargaining machinery.

ARGUMENT

I

THE CASE IS NOT MOOT

In its order granting the writ of certiorari the Court requested counsel to discuss the question whether the case is moot. In our opinion the case is not moot.

Both the order of the Board and the decree of the court required, among other things, that petitioner cease and desist from "* * * entering into any similar form of contract with its employees for any period subsequent to the date of this" decision or decree (R. 25, 62);[4] and from "refusing to bargain collectively with" the Union "in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment" (R. 25–26, 62–63). In addition, both the Board and the court ordered that petitioner "upon request, bargain collectively with" the Union "in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment" (R. 26, 63–64).

[4] The Board construes this provision (see *infra*, pp. 47–49) as prohibiting only such contracts as might interfere with collective bargaining. While this construction may narrow the scope of the order somewhat, it does not remove all restriction from petitioner's future conduct and, therefore, does not, contrary to petitioner's suggestion (Br. 22), make the cause moot.

Thus, notwithstanding the expiration of the individual contracts, both the Board's order and the court's decree require petitioner to fit its future conduct to a prescribed pattern, the latter under pain of contempt. The Board's order is a continuing one and the court's decree enforcing it is also continuing. Hence the case was not moot when it was decided by the court below and is not now moot. *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257, is indistinguishable.[5]

Because there is here a continuing order, it is unnecessary for the Court to consider whether in its absence the case would be governed by *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, on the one hand, or by *St. Pierre* v. *United States*, 319 U. S. 41, on the other. The latter case was held moot after the prisoner's sentence had been served notwithstanding the expected recurrence of an identical sen-

[5] In No. 130, *Matter of J. I. Case Co.*, decided July 22, 1942, 10 L. R. R. 721, the National War Labor Board ordered petitioner to enter into collective agreements and to discontinue obtaining individual contracts. In its letter of August 3, 1942, petitioner advised the War Labor Board it would comply for the duration of the war only, reserving, however, "the right to assert any legal question in an appropriate proceeding." However, this Court held in *Federal Trade Commission* v. *Goodyear Co.*, *supra*, at p. 260, that "Discontinuance of the practice * * * found to constitute a violation of the Act did not render the controversy moot." To the same effect, see *National Labor Relations Board* v. *Greyhound Lines*, 303 U. S. 261, 271, holding that compliance with a Board order containing continuing restraining provisions does not render a review of the order moot.

tence, because means would be at hand whereby the validity of the subsequent sentence could be determined without that sentence first becoming moot. In the former case the question was recurrent though the particular order had expired, but the Commission could if it chose whenever the question recurred enter short term orders which would expire before judicial review could be obtained. In these circumstances this Court held that the former case was not moot.[6] In the instant case, petitioner could, in the absence of a decree forbidding such action, enter into successive short term individual contracts which would expire before the Board could obtain enforcement from the Circuit Court of Appeals. As judicial review and enforcement could thus be forestalled, the instant case would seem, in the absence of the continuing order, to resemble more closely the *Southern Pacific Terminal* case, which was held not moot, than the *St. Pierre* case. However, in view of the fact that here, as in *Federal Trade Comm.* v. *Goodyear Co., supra,* there is a continuing order and hence a subject on which the judgment of this Court can operate (cf. *St. Pierre* v. *United States, supra,* at p. 42), this case does not present the more difficult question of whether in the absence of the continuing order the case would be moot.

[6] To the same effect, see *Gay Union Corp. v. Wallace*, 112 F. (2d) 192, 195 (App. D. C.), certiorari denied, 310 U. S. 647.

II

THE EXISTENCE OF THE INDIVIDUAL AGREEMENTS DID NOT EXEMPT PETITIONER FROM THE DUTY TO BARGAIN COLLECTIVELY WITH RESPECT TO TERMS OF EMPLOYMENT COVERED THEREBY

Petitioner concedes that at the time the Union requested it to bargain collectively the Union was the duly designated exclusive representative of its employees for purposes of collective bargaining.[1] It further concedes that when the Union presented it with a draft of a proposed collective bargaining contract and sought to negotiate with respect to it, petitioner refused on the ground that the terms of employment of a majority of its employees had already been fixed by individual contracts running for a definite period of time which had not yet expired (Br. 4–5). Petitioner did offer to negotiate with the Union respecting any matters which did not affect any rights it or its employees might have under the individual contracts and also to negotiate respecting those matters when the individual contracts expired (Br. 4–5).

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[1] While petitioner contended in the representation proceeding that the existence of individual contracts made it improper for the Board to conduct an election or certify a representative during their term, in this Court petitioner waives this point, stating "no question is presented regarding the representation proceeding or the Certification of Representatives" (Br. 4).

In this Court petitioner maintains that its conduct[8] did not constitute a refusal to bargain collectively within the meaning of the Act, in that Congress was dealing solely with the subject of collective bargaining, not with the subject of individual bargaining when it enacted the Act (Br. 10–13, 15). Petitioner asserts that the Act makes the representative chosen by a majority of the employees the representative of all the employees only for "collective" bargaining, thereby leaving any employee free even after such a representative has been chosen, to engage in "individual" bargaining (Br. 10–11). From this petitioner reasons that collective bargaining is merely applicable to employees who do not elect to make individual contracts (Br. 12) and that its offer to negotiate with the Union as to all matters and employees not covered by the individual contracts satisfied its obligation to bargain collectively (Br. 7).

A. CONGRESS INTENDED THAT THE DESIGNATED REPRESENTATIVE SHOULD HAVE THE POWER TO CONTRACT ON BEHALF OF ALL EMPLOYEES WITHIN THE UNIT

The Board and the court below both rejected petitioner's construction of the Act. They held

[8] Petitioner has incorrectly stated the basis of the Board's finding of a refusal to bargain collectively. Thus, petitioner states that "The unfair labor practice charged to respondent in connection with its refusal to bargain collectively, arose out of a communication by the Company to its employees reporting to them what had taken place between the Company and the Union representatives" (Br. 5). As clearly appears in the Board's decision (R. 18, 21–23), the finding that the petitioner refused to bargain collectively was based on the stipulated fact that petitioner refused to negotiate with the Union respecting matters covered by the individual contracts of employment (R. 33).

that Section 9 (a) of the Act in providing that the representative chosen by a majority of the employees in the unit should be the exclusive representative of all the employees in the unit for purposes of collective bargaining vested in such representative the power to bind the employees, not only to the exclusion of any other agency for collective bargaining but also to the exclusion of any individual bargaining during the pendency of the exclusive representative (R. 21–23, 58-61).[9] Under this construction of the Act, it was, as both the Board and the court below held (R. 23, 59–60), petitioner's duty to bargain collectively with the designated representative respecting all the terms and conditions of employment of all its employees, including all matters covered by the previously executed individual contracts.[10] Since the

[9] Acceptance of the position that Congress intended to exclude individual bargaining during the pendency of a designated representative merely means that the employer has no right to insist on individual bargaining if the representative chosen desires to preempt the field. It does not mean that the representative need exercise its power to exclude individual bargaining. Indeed, in instances where an employer accepts the principles of the Act, the union may agree that individuals are to bargain individually as to various matters which do not lend themselves to standardization. See footnote 18, pp. 27–28, *infra*.

[10] In its brief before this Court (Br. 7, 15) petitioner contends that the decision below means that individual contracts are superseded by the act of designating a collective bargaining representative. This contention misconceives the Board's decision. The Board did not hold that the des-

designated representative is by statute vested with power to bind all employees in the unit, petitioner's fears (Br. 14–15), that it will be required "to bargain collectively on all subjects and contract in a way which may conceivably violate [its] obligation to individual employees within the bargaining unit, and thereby confer upon them a right of action for breach of contract", are entirely groundless. The terms of a collective contract negotiated by the collective bargaining representative will bind each employee to the same extent as if he had himself amended or rescinded the individual contract.

The construction placed on the Act by the Board and the court below in this case is fully supported by the language of the Act, its legis-

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ignation itself had any effect upon the contracts into which any of the employees, individually or otherwise, had entered. It merely held that the effect of the designation was to vest in the representative the power to bind all employees to any terms respecting the employment relationship which the representative and the employer might include in any contract. If the petitioner had bargained with the Union in good faith proceeding upon the premise that the Union had full power to supersede the individual contracts either completely or to the extent of any inconsistent terms in any collective contract to which the employer might agree and no such contract had been signed, the individual contracts would have been left in full effect. If such a contract had been signed, the individual contracts would have been superseded only to the extent therein provided or to the extent the collective contract contained inconsistent terms. The order of the Board abrogating the contracts was entered only because petitioner utilized the individual contracts to defeat collective bargaining.

lative history, the meaning of the term "collective bargaining" accepted by economists and experts in the field of labor relations at the time Congress adopted that term, and the uniform interpretations of the Act by the Board and the courts. These sources establish that collective bargaining as a system excludes the fixing of terms of employment by individual bargaining during the pendency of a designated representative and presupposes the recognition by the employer of the power of the labor organization to exercise to the exclusion of the individual employees all powers which they would have had in the absence of the designation by the majority of a collective bargaining representative.

The purpose and language of the Act.—The purpose of Congress to encourage the development of collective bargaining as a substitute for individual bargaining because individual bargaining lacked the stability essential to keep the channels of commerce free from obstruction is set forth in Section 1 of the Act:

> SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest * * *.
>
> *The inequality of bargaining power* between employees * * * and employers * * * substantially burdens and affects the flow of commerce * * *.

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury * * * by removing certain recognized sources of industrial strife and unrest, * * * *by restoring equality of bargaining power between employers and employees.* [Emphasis supplied.]

It is evident from the background of the policy here expressed, that by the inequality of bargaining power, thus explicitly declared to be a major consideration in the enactment of the statute, Congress had in mind, not a mere disparity in strength between the individual employee and his employer, but rather a complete incapacity of the employee to participate in the process of realistic negotiations with his employer. As far back as 1898, this Court had noted that, in dealings between the industrial employer and the individual employee, bargaining power is so grossly disproportionate as to result in no bargain at all; that "in other words, the proprietors lay down the rules and the laborers are practically constrained to obey them." *Holden* v. *Hardy*, 169 U. S. 366, 397.[11] Congress itself had an-

[11] This fact, first announced in *Holden* v. *Hardy*, 169 U. S. 366, where this Court sustained a state statute limiting the miners' workday to 8 hours, has been the basis of succeeding decisions: *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13, re-

nounced a like finding in the Norris-LaGuardia Act (40 Stat. 70, 29 U. S. C., Sec. 102), that "under prevailing economic conditions * * * the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment." And the Senate Committee report on the proposed National Labor Relations Act declared that "the second major objective of the bill is to encourage, by developing the procedure of collective bargaining, that equality of bargaining power which is a prerequisite to equality of opportunity and freedom of contract" (Senate Report No. 573, 74th Congress, 1st Session, p. 3). In short, Congress recognized, as had this Court before it, that the "bargaining" which takes place between an employer and an individual employee is illusory, and that the "contracts" thus negotiated are merely statements of the employer's take-it-or-leave-it terms.

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quiring cash redemption of evidence of indebtedness issued in payment of wages; *Patterson* v. *Bark Eudora*, 190 U. S. 169, forbidding advance payment of seamen's wages; *McLean* v. *Arkansas*, 211 U. S. 539, prohibiting agreements to pay miners on the basis of the weight of screened coal; *Chicago, B. & Q. R. Co.* v. *McGuire*, 219 U. S. 549, 567, prohibiting contracts limiting liability for injuries to employees; *Bunting* v. *Oregon*, 243 U. S. 426, limiting hours of work of factory employees; *N. Y. Central R. Co.* v. *White*, 243 U. S. 188, and *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, sustaining workmen's compensation laws; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, sustaining a minimum wage law.

Moreover, in sustaining the constitutionality of the Act this Court said [12] (*National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33):

> Long ago we stated * * * that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.

Thus the purpose to which the Act was directed forecloses the construction which petitioner urges. Petitioner's interpretation would permit the individual employee, while subject to the very bargaining impotence to which the legislation is addressed, to "contract" away the protection which the Act affords him. The error of this interpretation is evident. It rests upon the irrational assumption that Congress, while finding the individual employee incapable of realistic bargaining without collective action, nevertheless intended to leave him capable of bargaining away, at the threshold, his statutory right to collective bargaining.

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[12] Repeating a statement by Chief Justice Taft in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 209.

Section 9 (a) of the Act, by providing that the representative chosen by a majority of the employees shall be the exclusive representative of all the employees in the unit, with the single exception that employees may present grievances,[12a] evidences the Congressional intent to supersede individual by collective bargaining. The proviso that employees may themselves present grievances would have been unnecessary if Congress had intended that employees could bargain individually, for anyone who could bargain for himself could *a fortiori* present a grievance.

The legislative history.—The intent of Congress that Section 9 (a) should eliminate all individual bargaining was expressly stated in both the House and Senate Committee reports on the Act. The House Committee said:

> Section 9 (a) incorporates the majority rule principle * * *. As a necessary corollary it is an act of interference (under sec. 8 (1)) for an employer, after representatives have been so designated by the majority, to negotiate with individuals or minority groups in their own behalf on

[12a] See Opinion of General Counsel of the Board, 13 L. R. R. 142, pointing out that Congress intended that individual employees be permitted to "present" grievances but not to settle them without the participation of the collective bargaining representative, and discussing the legislative history on which that conclusion was based.

> the basic subjects of collective bargaining.[13] * * * There cannot be two or more basic agreements applicable to workers in a given unit; * * * If the employer should fail to give equally advantageous terms to nonmembers of the labor organization negotiating the agreement, there would immediately result a marked increase in the membership of that labor organization. On the other hand, if better terms were given to nonmembers, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men per-

[13] A contemporaneous statement as to what would not be considered "basic subjects of collective bargaining" is found in Twentieth Century Fund, Inc., *Labor and the Government*, New York (1935), pp. 229-230: "There is not always a clear-cut division between negotiating with individuals or minority groups, which an employer is not permitted to do, and conferring with them, which he may do. However, the spirit of this and other similar findings and rulings (*Matter of Houde Engineering Co.*, 1 N. L. R. B. (old) 35, and other decisions of the Labor Board established to enforce Section 7a of the National Industrial Recovery Act, 15 U. S. C., Sec. 701 *et seq.*) indicates that an employer may enter into a collective agreement governing wages, hours and basic working conditions only with the representatives of the majority; but that he may confer with any individual or group in respect to grievances over the interpretation and enforcement of a collective agreement which affect only that individual or group. And he may also confer with and deal with any individual or group over matters not covered by the collective agreement and not part of wages, hours and basic working conditions—such as insurance, stock-purchase plans and social welfare." See also statement by the Twentieth Century Fund, Inc., presented to the Senate during the hearings on the Act, Hearings, Senate Committee on Education and Labor, 74th Cong., 1st Sess., on S. 1958, pp. 722–723.

> forming comparable duties were paid according to different scales of wages and hours. Clearly then, there must be one basic scale, and it must apply to all.[14]

Similarly the Senate Committee reported:

> Majority rule carries the clear implication that employers shall not interfere with the practical application of the right of employees to bargain collectively through chosen representatives by bargaining with individuals or minority groups in their own behalf, after representatives have been picked by the majority to represent all.[15]

The position taken by Congress was based on the testimony of experts. During the hearings preceding the enactment of the Act,[16] Mr. Francis Biddle, who at that time was chairman of the old National Labor Relations Board under Public Resolution No. 44, testified:

> The experience of this Board in the cases before it has indicated that the insistence of the employer on individual bargaining has been for the purpose of interfering with collective bargaining and not for the pur-

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[14] 74th Cong., 1st Sess., H. Rep. No. 1147, p. 20.

[15] 74th Cong., 1st Sess., S. Rep. No. 573, p. 13. Senator Wagner, sponsor of the bill, made substantially the same statement on the floor of Congress during the debates which led to adoption. 79 Cong. Rec. 7571.

[16] In these hearings everyone assumed that the intent and effect of Section 9 (a) was to prevent the existence of minority and individual agreements alongside the statutory contract. All witnesses agreed that this was the case, differing

pose of preserving the individual liberty of contract of the American workman."

Expert opinion.—Economists and experts in the field of labor relations in describing the system of collective bargaining point out that an essential feature is the use of collective action to the exclusion of any individual dealing (Appendix B,

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only in their views on the merits of the proposal. See, e. g., Senate Hearings, 74th Cong., 1st Sess., on S. 1958:

Pro: Senator Wagner, p. 43; Francis Biddle, p. 81; H. A. Millis, p. 180. Contra: James A. Emery, p. 261; Grover C. Brown, p. 372; E. J. Poole, p. 374; Henry I. Harriman, p. 465; Wendell E. Whipp, p. 488; James L. Donnelly, p. 511; A. B. Trembley, pp. 548–549; Statement of the Chicago Association of Commerce, p. 749.

[17] Hearings, Senate Committee on Education and Labor, 74th Cong., 1st Sess., on S. 1958, pt. 1, p. 81. The cases before the old Board in which individual contracts were so used are: *Matter of Edward F. Caldwell*, 1 N. L. R. B. (old) 12; *Matter of North Carolina Granite Corp.*, 1 N. L. R. B. (old) 89; *Matter of Whiting Milk Companies*, 1 N. L. R. B. (old) 137; *Matter of Columbian Iron Works*, 1 N. L. R. B. (old) 152; *Matter of Long & Harman, Inc.*, 2 N. L. R. B. (old) 163; *Matter of Poinsatte Auto Co.*, 2 N. L. R. B. (old) 204; *Matter of John E. Lucey Shoe Co.*, 2 N. L. R. B. (old) 251; *Matter of Vincennes Packing Corp.*, 2 N. L. R. B. (old) 433. The present Board has encountered the same use of individual contracts: *Matter of Adel Clay Products Co.*, 44 N. L. R. B. 386, 396, enf'd, 134 F. (2d) 342 (C. C. A. 8); *Matter of Western Cartridge Co.*, 44 N. L. R. B. 1, 7–8, enf'd, 134 F. (2d) 240, 243 (C. C. A. 7), cert. den. October 11, 1943; *Matter of Killefer Mfg. Co.*, 22 N. L. R. B. 484, 497–498; *Matter of Superior Tanning Co.*, 14 N. L. R. B. 942, 957–958, enf'd in this respect, 117 F. (2d) 881 (C. C. A. 7), cert. den., 313 U. S. 559; *Matter of Grower-Shipper Vegetable Ass'n*, 15 N. L. R. B. 322, 347–348, enf'd, 122 F. (2d) 368, 377 (C. C. A. 9); *Matter of Vincennes Steel Corp.*, 17 N. L. R. B.

pp. 56–67, *infra*).[18] Just as the term "collective bargaining" as understood at the time Congress adopted it implied a system including the reduction to the form of a written contract of any agreement reached (*H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 524), so also did the term at that time imply a system whereby the representative chosen by the majority has full and exclusive powers to bind all individuals in the unit. This result is dictated not merely by the technical meaning of the term but by the rationale behind the system. As these authorities conclusively demonstrate, the existence of any area in which individuals may bargain for themselves after a majority selects a representa-

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825, 831–832, enf'd, 117 F. (2d) 169, 172 (C. C. A. 7); *Matter of Norman H. Stone*, 33 N. L. R. B. 1014, 1023, enf'd, 125 F. (2d) 752, 754–756 (C. C. A. 7), cert. den. 317 U. S. 649; *Matter of Williams Mfg. Co.*, 6 N. L. R. B. 135, 143; *Matter of Jahn & Ollier Engraving Co.*, 24 N. L. R. B. 893, 909–911, enf'd, 123 F. (2d) 589, 593 (C. C. A. 7). For a history of the use of the written individual contract as an antiunion device, see Fitch, John. *The Causes of Industrial Unrest*, Harpers (1924), pp. 167–171.

[18] While the system of collective bargaining includes the right of the exclusive representative to bargain on all matters pertaining to the employment relationship to the exclusion of each individual employee, this does not mean that the exclusive representative may not, if it so desires, allow individuals within the unit to bargain individually respecting matters peculiarly of concern to them. During the period prior to the enactment of the Act when many employers bitterly opposed collective bargaining and employees achieved it, not as a right accorded by law, but as a result

tive leads to competition between individuals which immediately breaks down the standards which the majority has obtained for the entire group (Appendix B, pp. 57–63, *infra*). Employer favoritism to those resorting to individual dealing leads to desertion of the union, while employer pressure on individuals to accept employment on less advantageous terms leads union members to fear displacement. In either case, the individual bargaining weakens collective action and results in the strife and disruptions of commerce which it was the object of Congress to prevent.[19]

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of their economic strength, many collective bargaining agreements expressly provided that there should be no individual bargaining during the term of the agreement. U. S. Bureau of Labor Statistics, Bull. No. 419, *Trade Agreements 1925*, pp. 82, 133; Bull. No. 448, *Trade Agreements 1926*, pp. 16, 56, 60, 69, 71, 76, 87, 89; Bull. No. 468, *Trade Agreements 1927*, pp. 53, 71, 79, 142. In fields where the work of the employees in the unit is in certain respects unique it has been customary for both the employer and the union, in recognition of the authority of the union to bind the employees as to all terms, to provide in the collective bargaining contract that during the term of the contract the union will waive its right to exclude all individual bargaining to the extent of allowing individuals to bargain subject to the terms of the contract within a specified limited scope, as, for example, for wages higher than the minimum set in the Newspaper Guild contracts, U. S. Bureau of Labor Statistics, Bull. No. 686 *Union Agreement Provisions* (1942), pp. 263, 268, 269, or in the Musicians contracts, Bull. No. 419, *Trade Agreements 1925*, p. 101; Bull. No. 468, *Trade Agreements 1927*, p. 115.

[19] Mr. Biddle, then chairman of the old National Labor Relations Board, testifying before the Senate Committee, said (Hearings, 74th Cong., 1st Sess., on S. 1958, p. 81): "Actual

This has been the uniform construction placed on the Act by the Board. The problem first arose in *Matter of New England Transportation Company,* 1 N. L. R. B. 130, a case concerning representation in which the facts were almost identical with these in the case at bar. The Board said (pp. 138–139):

> Clearly the first group of "agreements," even if they be considered as legal contracts and not mere statements of a fact, does not in any manner affect the question of representation or collective bargaining. The fact that a definite wage has at one time been agreed upon in writing does not prevent later collective bargaining in respect to wages or any other matter. * * * The existing arrangements between the respondent and some of its mechanical em-

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collective bargaining in industry has always been conducted on the theory that a bargain made with one group in a unit sets the standard for the entire unit, and a wide study of trade agreements has disclosed none which does not attempt to establish uniform conditions throughout the unit. Failure of the employer to give equally advantageous terms to nonmembers of the union negotiating the agreement would immediately result in a marked increase in the union's membership, * * * and, on the other hand, the giving of better terms to nonmembers would result in a strike. It is, therefore, academic and a little silly to discuss the rights of minorities and individuals to negotiate for more favorable terms than those in the collective agreement. The purpose of the bill is to give workmen power to bargain effectively by collective action. It is obvious that they cannot do better by individual action." The House Report substantially adopts Mr. Biddle's testimony; see part quoted, pp. 23–25, *supra.*

> ployees are thus no bar to an election and consequent bargaining by the certified representatives of the employees. These representatives are of course free to bargain concerning changes in existing arrangements since parties may bargain with respect to the termination of existing contracts.

The *New England* case has been consistently followed by the Board.[20] The same principle has been applied by the Board in holding that the employer violated his duty to bargain collectively when, during the time that an exclusive representative was representing the employees, the employer entered into contracts with one or more individual employees.[21]

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[20] *Matter of The Gates Rubber Co.*, 8 N. L. R. B. 303, 306; *Matter of Dain Mfg. Co.*, 29 N. L. R. B. 526, 528; *Matter of Western Cartridge Co.*, 31 N. L. R. B. 888, 890; *Matter of Walter Lantz Productions*, 16 N. L. R. B. 215, 231–232; *Matter of Norman H. Stone*, 22 N. L. R. B. 850, 852–853; *Matter of Item Co., Ltd.*, 31 N. L. R. B. 278, 280–281; Cf. *Matter of Metro-Goldwyn-Mayer Studios*, 7 N. L. R. B. 662, 697.

[21] In these cases the Board has expressly rejected the argument that the decisions of this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and *Virginian Railway v. Federation*, 300 U. S. 515, held that "the right to make individual contracts" was a "permissible alternative to the obligation of collective bargaining where the employees have, in accordance with the Act, selected representatives therefor." *Matter of The Stolle Corp.*, 13 N. L. R. B. 370, 381; *Matter of Schierbrock Motors*, 15 N. L. R. B. 1109, 1115. Cf. *Matter of Medo Photo Supply Corp.*,

B. THE COURT DECISIONS UNIFORMLY SUPPORT THE BOARD'S CONSTRUCTION OF THE ACT

The courts which have considered the point under the Act [22] have uniformly sustained the Board's position. Thus in *National Labor Relations Board* v. *Knoxville Publishing Co.*, 124 F. (2d) 875, 881 (C. C. A. 6), in adjudging an employer in contempt of court for refusing to bargain collectively, the court said:

> The intent of the act was to permit an employee to surrender to a collective agent his individual right to bargain with an employer, after which he no longer possesses this right during the life of the contract and the statute requires the employer to deal exclusively with the agent

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43 N. L. R. B. 989, 997, enf'd 135 F. (2d) 279 (C. C. A. 2), cert. granted October 11, 1943, No. 265, this Term; *Matter of The Hanson-Whitney Machine Co.*, 8 N. L. R. B. 153, 159; *Matter of Reed & Prince Mfg. Co.*, 12 N. L. R. B. 944, 959, 976, enf'd 118 F. (2d) 874, 887 (C. C. A. 1), cert. den., 313 U. S. 595; *Matter of Interstate S. S. Co.*, 36 N. L. R. B. 1307, 1321.

[22] No court except the court below in the instant case has been called upon to determine the power of the exclusive representative to bargain respecting valid contracts made prior to its certification. However, this Court in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, speaking of contracts executed by a union which was not the exclusive representative and which therefore bound only its members, not all employees in the unit, said (p. 239): "the continued operation of the contracts is necessarily subject to the provisions of the law by which representatives of the employees for the purpose of collective bargaining can be ascertained in case any question of 'representation' should arise."

of his employees if one has been selected as provided.[23]

The foregoing legislative history, economic authorities and Board and court decisions show that collective bargaining requires that the employer accord the exclusive representative recognition as an agent empowered to act for and bind every employee in the unit in all matters within the field of collective bargaining. When this meaning of the collective bargaining concept is accepted, it is plain that petitioner's conduct fell far short of that required. By asserting that it would not negotiate respecting any of the matters covered by the individual contracts, petitioner removed from the scope of collective bargaining the bulk of the matters about

[23] To the same effect see: *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. (2d) 417, 420 (C. C. A. 2); *National Labor Relations Board* v. *Highland Shoe, Inc.*, 119 F. (2d) 218, 221, 222 (C. C. A. 1); *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. (2d) 432, 435 (C. C. A. 7); *Stewart Die Casting Corp.* v. *National Labor Relations Board*, 114 F. (2d) 849, 853 (C. C. A. 7), cert. den., 312 U. S. 680; *National Labor Relations Board* v. *Grower-Shipper Ass'n*, 122 F. (2d) 368, 377 (C. C. A. 9); *National Labor Relations Board* v. *North American Aviation, Inc.*, 136 F. (2d) 898, 899 (C. C. A. 9).

For concurring views of commentators, see Rosenfarb, Joseph, *The National Labor Policy*, Harpers (1940), pp. 225–232; Hoeniger, Heinrich, *The Individual Employment Contract Under the Wagner Act*, 10 Fordham Law Rev. 14; Rice, William Gorham, Jr., *The Legal Significance of Labor Contracts Under the National Labor Relations Act*, 37 Mich. Law Rev. 693, 702–703.

which it should have negotiated. Since at the time petitioner had individual contracts with 415 of the 582 employees in the unit, fixing their wages, hours and working conditions, petitioner thus refused to negotiate with the Union respecting the wages, hours and most of the working conditions of the majority of the employees in the unit. By asserting that any contract negotiated with the Union would constitute a breach of its individual contracts, petitioner denied the Union the recognition to which it was entitled. It thereby failed to accept the premise upon which all collective bargaining must proceed, namely, that the exclusive representative has the right to bind any employee in the unit in respect to any contractual provision respecting the employment relationship to which the individual employee if acting in person could bind himself. And finally, as the Board found (R. 22), by attempting to limit the group on behalf of whom it would recognize the Union as a representative with full powers to the 167 employees not covered by the individual contracts, petitioner refused to accept the unit determined by the Board.

The impractical result of petitioner's position is obvious. If its view prevailed, a necessary consequence would be that numerous agreements, each negotiated separately and each completely independent of the other's terms, might exist

coordinately in a single appropriate unit. In the case at bar, for example, petitioner asserted its readiness to contract with the Union as to the wage schedule of the 25 percent of its employees not covered by the agreements, while continuing to give effect to the various wage provisions individually accepted by each of the employees in the remaining group (R. 30, 33). As we have seen, pp. 23–26, *supra*, this is exactly the situation which Congress sought to foreclose.

Indeed petitioner's position in essence becomes one of arguing that the employees contracted not to demand collective bargaining during the term of the contracts. That position overlooks the purpose of the Act (see pp. 19–23, *supra*). The argument is, in any event, foreclosed by the decision of this Court in *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, in which it was held that an employer may not, by express provision in individual contracts with employees, impose limitations upon subsequent collective bargaining with their representatives. The contracts in the *National Licorice* case bound the signatory employees to refrain from requesting a closed-shop or a signed union agreement, and from questioning, through their representatives, the propriety of an employee's discharge. The Court, deeming these provisions to foreclose collective bargaining with respect to matters which "are frequent subjects of negotiation between employer and employees," held that they thereby

"imposed illegal restraints upon the employees' rights to organize and bargain collectively" and that they "stipulated for the renunciation by the employees of rights guaranteed by the Act." Accordingly, the Court sustained the Board's order enjoining the employer from enforcing the contracts (309 U. S. at 360–361, 365).[24] In the instant case, petitioner seeks to give contracts which contain no such express provisions the very restrictive effect which the *National Licorice* case held could not be provided for expressly (R. 33). Manifestly, petitioner cannot accomplish by the mere execution of a contract that which it cannot do by express provision therein.[25]

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[24] Other provisions in individual contracts held to foreclose or limit future collective bargaining were held invalid on the same ground in *National Labor Relations Board* v. *Superior Tanning Co.*, 117 F. (2d) 881, 891–892 (C. C. A. 7), cert. denied, 313 U. S. 559; *National Labor Relations Board* v. *Stone*, 125 F. (2d) 752, 756 (C. C. A. 7), cert. denied, 317 U. S. 649; *National Labor Relations Board* v. *Vincennes Steel Corp.*, 117 F. (2d) 169, 172–173 (C. C. A. 7).

Although the contracts in these cases, as well as in *National Licorice Co.* v. *National Labor Relations Board*, *supra*, were tainted by other elements of illegality, the respective decisions expressly held the clauses restricting collective bargaining to be illegal in themselves, apart from other considerations. Thus petitioner's attempted distinction of the *National Licorice* case (Br. 11) is without merit.

[25] Since petitioner's contracts invariably fix wage rates (R. 35), petitioner's contention would foreclose, for their duration, collective negotiations toward the establishment of a wage schedule that would affect the pay of the 415 contractholders. Rate of pay is of course a frequent subject of negotiation between employer and employees; it is the essential subject matter of every contract of employment, the con-

Petitioner's position is moreover untenable for reasons other than those peculiarly applicable to individual agreements. The courts have recognized that even the execution of a collective agreement does not terminate the employer's duty to bargain collectively concerning matters covered in the agreement. This Court has so intimated (*National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342), saying:

> * * * But we assume that the Act imposed upon the employer the further obligation to meet and bargain with his employes' representatives respecting proposed changes of an existing contract * * *.

And *Rapid Roller Co.* v. *National Labor Relations Board*, 126 F. (2d) 452, 459 (C. C. A. 7), certiorari denied, 317 U. S. 650, and *National Labor Relations Board* v. *Newark Morning Ledger Co.*, 120 F. (2d) 262, 267 (C. C. A. 3), certiorari denied, 314 U. S. 693, have so held. In the light of the express congressional findings previously discussed, it is clear that Congress did not intend to bestow upon an individual contract the restrictive effect upon future collective bargaining which is denied to collective contracts made with the statutory representative.

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sideration for which the workman gives his services. To exclude from negotiations the question of wage rates for 75 percent of the employees in the unit is obviously to take the heart out of collective bargaining.

Moreover, petitioner's reliance on its contracts, in rejecting the Union's request for full collective bargaining, is necessarily based on a premise precluded by uniform judicial authority; to wit, that the acceptance of an individual contract by an employee constituted a waiver of his statutory right to collective bargaining concerning the matters covered in the contract. The courts have consistently held that the Act vindicates public, not private rights,[26] and that neither individuals nor their representatives can waive benefits arising thereunder.[27] The reason that private action to waive the statutory rights cannot be allowed operative effect is particularly evident in the instant

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[26] *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 266–269; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 360, 362–363; *Agwilines, Inc.* v. *National Labor Relations Board*, 87 F. (2d) 146, 150, 151 (C. C. A. 5); *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 182–183 (C. C. A. 6); *National Labor Relations Board* v. *General Motors Corp.*, 116 F. (2d) 306, 312 (C. C. A. 7).

[27] Thus employees cannot by contract waive benefits under a back pay order. *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 113 F. (2d) 232, 235 (C. C. A. 9); *Waterman Steamship Corp.* v. *National Labor Relations Board*, 119 F. (2d) 760, 762 (C. C. A. 5). Nor may a union, although not operating under the bargaining handicap of the individual employee, contract away its right to unlimited recognition, *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. (2d) 748, 751–752 (C. C. A. 7), cert. denied, 31 U. S. 565, or its right to file charges with respect to prior unfair labor practices, *National Labor Relations Board* v. *General Motors Corp.*, 116 F. (2d) 306, 311–312 (C. C. A. 7). Cf. *National Labor Relations Board* v. *Oregon Worsted Co.*, 96 F. (2d) 193, 196 (C. C. A. 9).

case, where the asserted waiver resulted from dealings in which the individual was pitted against the employer with all the disparity in bargaining power which the courts and Congress have so forcefully described.

Contrary to petitioner's contention (Br. 8–11), there is no inconsistency between the holdings below and the views of this Court expressed in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44–45.[28] The meaning of

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[28] The portion of the *Jones & Laughlin* opinion relied upon by petitioner is as follows:

"* * * The provision of § 9 (a) that representatives, for the purpose of collective bargaining, of the majority of the employees in an appropriate unit shall be the exclusive representatives of all the employees in that unit, imposes upon the respondent only the duty of conferring and negotiating with the authorized representatives of its employees for the purpose of settling a labor dispute. This provision has its analogue in § 2, Ninth, of the Railway Labor Act [as amended (45 U. S. C., Sec. 152, Ninth)], which was under consideration in *Virginian Railway Co.* v. *System Federation No. 40, supra.* The decree which we affirmed in that case required the Railway Company to treat with the representative chosen by the employees and also to refrain from entering into collective labor agreements with anyone other than their true representative as ascertained in accordance with the provisions of the Act. We said that the obligation to treat with the true representative was exclusive and hence imposed the negative duty to treat with no other. We also pointed out that, as conceded by the Government, the injunction against the company's entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was 'designed only to prevent collective bargaining with anyone purporting to represent employees' other than the representative they had selected. It was taken 'to prohibit the negotiation of labor

the passage upon which petitioner relies on is made clear by the succeeding paragraph (301 U. S. at 45), in which the Court said that—

> The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer "from refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilateral action determine." * * * The theory of the Act is that free opportunity for negotiation with accredited representatives of employees * * * may bring about the adjustments and agreements which the Act in itself does not attempt to compel.

This language, in context with the remainder of the paragraph and the preceding one, shows that the Court meant only that an employer could hire employees and carry on his business even if the required negotiation failed to produce adequate collective contracts. The Court specifically recognized that "free opportunity for negotiation" was required, which implies necessarily freedom from contractual bars preventing negotiation. Nor is

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contracts, generally applicable to employees' in the described unit with any other representative than the one so chosen, 'but not as precluding such individual contracts' as the company might 'elect to make directly with individual employees.' We think this construction also applies to § 9 (a) of the National Labor Relations Act [29 U. S. C., Sec. 159 (a)]."

there anything in *Virginian Railway Co.* v. *Federation*, 300 U. S. 515, or in this Court's reference to it in the *Jones & Laughlin* opinion, which carries a contrary suggestion. In the *Virginian Railway* case the Court was faced with a decree which literally construed would have enjoined the employer from entering into individual contracts under any circumstances whatever. The language referred to was used by the Court in pointing out [29] that neither the decree nor the Act concerned should be so construed, since neither would prevent the making of individual contracts whenever there was no exclusive representative designated, nor on matters which had been left by the collective bargaining to individual negotiation, nor on all matters if after sincere negotiations [30] the parties failed to agree on a collective contract.

Finally, if the meaning which petitioner attaches to the quotation on which it relies were properly to be found therein, it would be inconsistent with the subsequent decision in *National*

[29] As the Government had conceded that the decree should not be literally construed. *Virginian Railway* v. *Federation*, 300 U. S. at 548–549.

[30] It is settled that the refusal by the employer to make a collective contract, referred to in the quotation from the *Jones & Laughlin* opinion, is proper only if the employer has first negotiated in a good faith effort to reach an agreement with the designated agent. *National Labor Relations Board* v. *Westinghouse Air Brake Co.*, 120 F. (2d) 1004 (C. C. A. 3); *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. (2d) 780 (C. C. A. 9), certiorari denied, 312 U. S. 678; cf. *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 526.

Licorice Co. v. *National Labor Relations Board,* 309 U. S. 350, where this Court held that an employer could not by contract obtain exemption from the statutory duty to bargain collectively.

Petitioner's suggestion that the constitutional protection accorded to liberty of contract necessitates the construction it places on the *Jones & Laughlin* opinion (Br. 12, 23) is unsupportable. Like other constitutional liberties, liberty of contract is not an absolute right. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 347–348. On the very day on which the Court issued its decision in *Virginian Railway* v. *Federation,* 300 U. S. 515, 549, and only two weeks before the *Jones & Laughlin* decision itself was issued, the Court had occasion to express itself fully on the power of the legislature to limit the individual's freedom to contract in the interests of the public welfare. *West Coast Hotel* v. *Parrish,* 300 U. S. 379. More recently, this Court sweepingly affirmed the right of legislative bodies to limit freedom of contract in the public interest. *Olsen* v. *Nebraska,* 313 U. S. 236. Thus there is no occasion to doubt the continued validity of this court's statement in *Federal Radio Commission* v. *Nelson Bros Co.,* 289 U. S. 266, 282, that "* * * the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing [private] arrangements which would conflict with the execution of its policy * * *."

The foregoing authorities would support the application of the restrictions of the Act to petitioner's contracts even if they antedated the enactment of the Act. *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 307–308. Cf. *Union Bridge Co.* v. *United States*, 204 U. S. 364, 399–401. The fact is, however, that these contracts were annual affairs first introduced in 1937; thus they were entered into subject to the already existing statutory duty to bargain collectively should a designated bargaining agent of the employees so request.

To summarize, there is no basis for petitioner's contention that its individual contracts excused it from bargaining fully with the duly designated representative of its employees as to all terms of employment concerning all employees in the concededly appropriate bargaining unit. The obligation to bargain with the statutory representative is plenary within the field defined by Section 9 (a), and the employer may not, by agreement with individual employees, avoid that obligation. The Union was therefore entitled, on March 7, 1942, to full and immediate recognition as the bargaining agent for all employees in the unit, with respect to all "rates of pay, wages, hours of employment, or other conditions of employment." Petitioner, as the Board found (R. 23), "by insisting that those who signed contracts wish to

bargain on an individual basis and by refusing to deal with the Union with respect to terms and conditions covered by the individual contracts, * * * failed to bargain collectively within the meaning of the Act," and thereby violated Section 8 (1) and (5) thereof.

III

THE BOARD'S ORDER IS VALID AND SHOULD BE ENFORCED

In paragraph 1 (a) of its order, the Board directed petitioner to cease giving effect to the individual contracts or to any "modification, continuation, extension or renewal thereof," and "from entering into any similar form of contract * * *" (R. 25).[31] This provision of the order was predicated upon petitioner's use of the contracts to evade its collective bargaining obligations and to interfere with the self-organization of its employees. In addition to finding that petitioner had illegally refused to bargain with the Union, the Board found that, by the letters of December 17, 1941 (at the time of the representation hearing and prior to the election) and March 19, 1942 (following the request to bargain collectively), petitioner had sought to divert its employees from further support of the Union by advising them that such support "would be of no

[31] The decree of the court below enforced this provision (R. 62).

avail, since [petitioner] would refuse to deal with" the Union (R. 23). The Board concluded that, by employing the contracts as an excuse for not bargaining collectively within the meaning of the Act and by circularizing the employees with intent to divert them from collective activity, petitioner had "utilized the contracts to interfere with and impede its employees" in the exercise of their rights guaranteed by the Act (R. 23).[32] In prescribing the remedy the Board said, "since we consider such contracts to constitute an obstacle to the full exercise of the right to collective bargaining, we find it necessary, in order to effectuate the policies of the Act to order the [petitioner] to refrain from enforcing the contracts" (R. 24).[33]

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[32] With respect to the communications, the circuit court said:

"In view of our conclusion, [petitioner's] communications to its employees were improper. Inasmuch as it could not rightfully refuse to bargain because, as it said, it was barred by various individual contracts, and inasmuch as the premise was unsound, it was improper to submit it to its employees as a circumstance influencing their action in selecting or recognizing a bargaining agent. The erroneous conclusion contained in the quoted language of its letter was such as to advise the employees that [petitioner] considered that it had been wrongfully directed to bargain collectively without regard to the existing contracts. In taking this position, as we have seen, it was mistaken, and to bring to bear, as an influential factor upon its employees, the use of the erroneous conclusion was an invasion of that neutrality required of employers in dealing with their employees prescribed by the Act" (R. 61).

[33] The National War Labor Board in directing petitioner to discontinue the individual contracts (see footnote 5, p. 13.

The court below concurred (R. 59–61). It is submitted that upon the undisputed facts, these findings and conclusions were warranted, and that paragraph 1 (a), based thereon, is valid and appropriate. *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 364, 367; *National Labor Relations Board* v. *Superior Tanning Co.*, 117 F. (2d) 881, 892 (C. C. A. 7), certiorari denied, 313 U. S. 559.[34] Petitioner's objection (Br. 14) to the provision in the order that the discontinuance of the contracts be "without prejudice to the assertion of any legal rights the employee may have acquired under such contract" (R. 26) is foreclosed by the decision of this Court in *National Licorice Co.* v. *National Labor Relations Board, supra*, at p. 367, instruct-

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supra) said: "Irrespective of their legality they [the individual contracts] have been an obstacle to sound collective bargaining, and should be discontinued. * * * They do detract from the new [collective] agreement in the sense that suspicion and opposition linger in the minds of the union men." Report and Recommendations of the National War Labor Board Panel, adopted by the National War Labor Board in No. 130, *Matter of J. I. Case Co.*, decided July 22, 1942, digested in 10 L. R. R. Man. 1057, 1059.

[34] Since the order is based upon the finding that the contracts were employed by petitioner as a means of thwarting the policies of the Act, petitioner's invocation of its constitutional right of free speech is without merit. The presence of utterances in a context of unfair labor practice does not preclude the Board from acting to remove the effects of the totality of such practice. *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477–478; *Valley Mould & Iron Corp.* v. *National Labor Relations Board*, 116 F. (2d) 760, 766 (C. C. A. 7), certiorari denied, 313 U. S.

ing the Board to insert that provision in a comparable order.

The continuing aspects of the order which restrain petitioner from entering into "similar form[s]" of contract in the future, are likewise appropriate means to insure that petitioner will bargain collectively in the future. Since, as the Board found, petitioner had in the past utilized the individual contracts to thwart the employees' rights to collective bargaining, it is a reasonable inference that petitioner would do so in the future if not prevented. The order is an appropriate preventive.[35]

This future prohibition is limited to "similar form[s]" of contract—i. e., similar to the form

590; *National Labor Relations Board* v. *Chicago Apparatus Co.*, 116 F. (2d) 753, 756–757 (C. C. A. 7); *National Labor Relations Board* v. *The Baldwin Locomotive Works*, 128 F. (2d) 39, 50 (C. C. A. 3); *National Labor Relations Board* v. *Federbush Co.*, 121 F. (2d) 954, 957 (C. C. A. 2); cf. *National Labor Relations Board* v. *General Motors Corp.*, 116 F. (2d) 306, 309, 311 (C. C. A. 7); *National Labor Relations Board* v. *Lightner Publishing Corp.*, 113 F. (2d) 621, 625 (C. C. A. 7).

[35] Petitioner's offer of compliance for the duration of the war, made to the War Labor Board, is not relevant to the validity of the continuing order. *National Labor Relations Board* v. *Newport News Co.*, 308 U. S. 241, 249–250. The sole issue is the validity of the order under the conditions existing when it was made. *National Labor Relations Board* v. *Hobbs*, 132 F. (2d) 249, 251–252 (C. C. A. 1); *National Labor Relations Board* v. *McLain Fire Brick Co.*, 128 F. (2d) 393, 394–395 (C. C. A. 3); *National Labor Relations Board* v. *Newberry Lumber & Chemical Co.*, 123 F. (2d) 831, 838 (C. C. A. 6); *National Labor Relations Board* v. *Oregon Worsted Co.*, 96 F. (2d) 193, 196 (C. C. A. 9); *National*

of contract herein found to have been improperly utilized. This type of contract, it will be noted, is not an agreement between petitioner and an employee fixing special terms of employment of particular interest to the latter, nor do its terms arise out of special bargaining between the employer and the signatory employee. The contract [35] is a uniform printed document (except for the wage figure, which we may reasonably assume to be uniform for all employees similarly situated), and it is distributed among the employees for individual acceptance or rejection *in toto*. The contract is therefore in substance an individually-signed group contract, establishing a normative schedule of basic employment terms for the plant, or at least for the group of employees who expressly accept it. This kind of an "individual" contract may not, even in the absence of a Board order, be directly offered to employees who are represented by a statutory bargaining agent. "To permit the employer to go behind the chosen bargaining agent and [thus] to negotiate with the employees directly" on basic terms of employment normally and prop-

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Labor Relations Board v. *Pure Oil Co.*, 103 F. (2d) 497 (C. C. A. 5); *New Idea, Inc.* v. *National Labor Relations Board*, 117 F. (2d) 517, 526 (C. C. A. 7).

[35] If contract it be. Mr. Reilly, in a special concurring opinion, expressed the view that the contract was unenforceable for lack of mutuality because it bound the employer to nothing (R. 27–28).

erly within the scope of collective bargaining "would result in nothing but disarrangement of the mechanism of negotiation created by the Act, disparagement of the union, whether good or bad, and acute, if not endless, friction, which it is the avowed purpose of the Act to avoid or mitigate." *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. (2d) 417, 420 (C. C. A. 2).[37]

The order with respect to "similar form[s]" of contract in the future thus merely enjoins acts already prohibited by the statute in the presence of a statutory bargaining agent.

Petitioner implies (Br. 21–22) that the order perpetually enjoins it from entering into any kind of individual agreement at any time. It thereby expands the scope of the restraint beyond the limits set by the Board itself. The provision in question, as we have seen, is based upon the finding that the contracts were utilized as a means of interfering with rights guaranteed by the Act and constituted an obstacle to collective bargaining. Read in the context of this finding, the requirement of the cease and desist provisions enjoins petitioner only from continuing to derive benefits from the contracts heretofore utilized to forestall collective bargaining and deter self-organization, and from entering into new con-

[37] To the same effect see cases cited footnote 23, p. 32, *supra*. See also the Committee reports, quoted at pp. 23–26, *supra*.

tracts either for the purpose of again thus utilizing them or under circumstances in which similar infringement of the collective bargaining process would be a probable consequence. The paragraph does not prevent petitioner from contracting with individual employees under circumstances which negative any intent to interfere with the employees' rights under the Act. Cf. *National Labor Relations Board* v. *Adel Clay Products Co.*, 134 F. (2d) 342, 345–346 (C. C. A. 8), enforcing 44 N. L. R. B. 386, 402; *Virginian Railway* v. *Federation*, 300 U. S. 515, 548, 549. Thus construed, the challenged requirement is but a reasonable safeguard "to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past." *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 436–437. Cf. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 461.

The order was properly sustained and enforced below. Moreover, even if there were substantial doubt of the propriety of the remedy chosen by the Board, the court below could not have substituted its own judgment for that of the Board. Cf. *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, 227; *National Labor Relations Board* v. *Greyhound Lines*, 303 U. S. 261, 270.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below should be affirmed.

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APPENDIX A

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449; 29 U. S. C., Sec. 151, *et seq.*) are as follows:

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or

other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective

bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10.

* * * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or trans-

acts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings,

by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * *

APPENDIX B

Statements of Economists and Experts in the Field of Labor Relations Respecting the Relationship of Individual Bargaining to Collective Bargaining

Reports of U. S. Industrial Commission, V. 17, 57th Cong., 1st Sess., H. R. Doc. No. 186, Washington (1901), p. LXXVI:

> The actual process by which the general terms of the labor contract are established by negotiations between employers and organized workingmen directly, is essentially a process of bargaining. The bargaining is collective because the workingmen are organized, and in many instances the employers are organized as well. We cannot speak of collective bargaining properly in cases where individual workingmen negotiate with employers as to the terms of the labor contract. It is, of course, a familiar fact that the individual laborer is usually in a position of inferior economic strength as against the employer in agreeing upon the labor contract. More and more laboring men are tending to get together, to organize, and to negotiate with employers collectively.

Webb, Sidney and Beatrice, *Industrial Democracy*, London (1902 ed.), pp. 173, 177:

THE METHOD OF COLLECTIVE BARGAINING

> The nature of the Method of Collective Bargaining will be best understood by a series of examples.

In unorganised trades the individual workman, applying for a job, accepts or refuses the terms offered by the employer, without communication with his fellow-workmen, and without any other consideration than the exigencies of his own position. For the sale of his labor he makes, with the employer, a strictly individual bargain. But if a group of workmen concert together, and send representatives to conduct the bargaining on behalf of the whole body, the position is at once changed. Instead of the employer making a series of separate contracts with isolated individuals, he meets with a collective will, and settles, in a single agreement, the principles upon which, for the time being, all workmen of a particular group, or class, or grade, will be engaged.

* * * * *

This practice of Collective Bargaining has, in one form or another, superseded the old individual contract between master and servant over a very large proportion of the industrial field. "I will pay each workman according to his necessity or merit, and deal with no one but my own hands,"—once the almost universal answer of employers—is now seldom heard in any important industry, except in out-of-the-way districts, or from exceptionally arbitrary masters.

Mitchell, John, *Organized Labor*, Philadelphia (1903), pp. 3–4:

* * * The "individual bargain," or individual contract, between employers and men means that the condition of the worst and lowest man in the industry will be that

which the best man must accept. From first to last, from beginning to end, always and everywhere, trade unionism stands unalterably opposed to the individual contract. There can be no concession or yielding upon this point. No momentary advantage, however great or however ardently desired, no advance in wages, no reduction in hours, no betterment in conditions, will permanently compensate workingmen for even a temporary surrender in any part of this fundamental principle. It is this principle, the absolute and complete prohibition of contracts between employers and individual men, upon which trade unionism is founded. There can be no permanent prosperity to the working classes, no real and lasting progress, no consecutive improvement in conditions, until the principle is firmly and fully established, that in industrial life, especially in enterprises on a large scale, the settlement of wages, hours of labor, and all conditions of work, must be made between employers and workingmen collectively and not between employers and workingmen individually.

To find a substitute for the individual bargain, which destroys the welfare and the happiness of the whole working class, trade unions were founded. A trade union, in its usual form, is an association of workmen who have agreed among themselves not to bargain individually with their employer or employers, but to agree to the terms of a collective or joint contract between the employer and the union. The fundamental reason for the existence of the trade union is that by it and through it, workmen are enabled to deal collectively

with their employers. The difference between the individual and the collective or joint bargain is simply this, that in the individual contract or bargain one man of a hundred refuses to accept work, and the employer retains the services of ninety and nine; whereas in the collective bargain the hundred employees act in a body, and the employer retains or discharges all simultaneously and upon the same terms. The ideal of trade unionism is to combine in one organization all the men employed, or capable of being employed, at a given trade, and to demand and secure for each and all of them a definite minimum standard of wages, hours, and conditions of work.

Trade unionism thus recognizes that the destruction of the workingman is the individual bargain, and the salvation of the workingman is the joint, united, or collective bargain. To carry out a joint bargain, however, it is necessary to establish a minimum of wages and conditions which will apply to all. By this is not meant that the wages of all shall be the same, but merely that equal pay shall be given for equal work.

Carver, Thomas N., *Principles of Political Economy*, Boston (1919), p. 403:

The fundamental principle involved in the trade-union policy of the present is the substitution of the indispensable group as a bargaining unit for the dispensable individual. Since the group as a whole is indispensable to industry, if they can bargain as a whole the laborers are in a strong position. As a group they cannot possibly be spared. The difficulty, however,

has always been to hold the group together and get them to bargain absolutely as an indispensable group and to refrain from making individual bargains independently of group action.

Hoxie, Robert Franklin, *Trade Unionism in the United States*, New York (1923), pp. 255–257, 287:

There are four main strands to the theory of collective bargaining. The first is a theory of standardization * * * individual or competitive bargaining on the part of the workers means progressive deterioration of wages and conditions of employment. The tendency is for wages and conditions to sink to the level which could be secured through the competitive strength of the weakest worker of the group. The only way to prevent this deterioration is to rule out all competition between the individual workers of the group, both in the making of the bargain with the employer, and in the subsequent interpretation of it and work under it.

This can be done only by the establishment and maintenance of two principles: the principle of uniformity in regard to all the conditions of work and pay where competition direct or indirect can take place between individual workers, and the principle of standardization, or restrictive regulation, by the group, of all changes in conditions of work and pay during the term of the wage contract.

* * * * * *

The result of these assumptions, which are the workers' interpretation of group experience, is the positive economic program of unionism, the broad outline of which may

be put into two propositions: (1) If the wages and conditions of the group are not to sink to what can be commanded by its weakest labor bargainer, they must make the strength of the weakest bargainer equal to the strength of the group. (2) If the wages of the group are to be kept from falling or to be increased, and the conditions of employment maintained or bettered, they must constantly attempt to increase the bargaining strength of the group as against the employers of the group and as against other groups.

How, then, can the unions carry this program into effect? First, how can they make the strength of the weakest bargainer of the group equal to the bargaining strength of the group? If we accept the position of the workers as so far tenable, it is evident that this can be done only by removing the possibility of all competition between the individual workers of the group. The general method devised by the unions for accomplishing this is to substitute collective bargaining for individual bargaining between the employers and the workers.

Watkins, Gordon S., *An Introduction to the Study of Labor Problems*, New York (1922), pp. 332–3:

To prevent this progressive deterioration in the standards of employment and to improve the economic status of the workers, collective bargaining is introduced, which excludes from determination of the labor contract the exigencies of individual circumstances. Collective bargaining substitutes group action for individual action in negotiating, interpreting and enforcing contracts and agreements. Collective bar-

gaining implies certain principles of procedure. (1) Wherever competition may arise among the workers the cardinal principle of true collective bargaining requires uniformity of wages and conditions of work. There must be a uniform minimum of standards below which no member of the group will consent to work, (2) The principle of standardization must be expressed in restrictive regulations that will prevent changes in the terms of the labor agreement during the specific life of the compact.

Catlin, Warren B., *The Labor Problem*, New York (1926), p. 322:

> For all this weakness and subserviency (of the individual worker) collective bargaining substitutes the "common rule." By combining all members of the group, it re-enforces the waiting-power of the individual with the resources of the group. By presenting the demands of all at once, it prevents underbidding and the degradation of wages and other terms according to the exigencies of a few. It is founded upon the maintenance of a common or, at any rate, a minimum standard of living for all members of the group.

Watkins, Gordon S., *Labor Problems*, New York (1929), p. 409:

> The wage-earner's most immediate and practicable approach to a solution of his industrial problems is found in uniting with his fellow workers to substitute group action for individual effort. Thus labor organizations are formed for the purpose of supplanting the individual bargain by the collective bargain.

Cummins, E. E., *The Labor Problem in the United States,* New York (1932), pp. 261–262:

> The laborer has substituted collective bargaining for individual bargaining because individual bargaining is so ineffective. It is true that the individual laborer is bargaining with the individual employer, but the employer has the advantage. To him one laborer more or less is a matter of no great concern particularly when trade is not brisk; and even when it is, he can give up a single employee without any serious inconvenience. To bargain effectively, the bargainer must have something that the other party greatly desires, and must at the same time have no great desire for the other party's commodity. This, except in most unusual circumstances, is not the laborer's position; whereas the employer has something that the laborer wants very much indeed, namely a job, and seldom needs very badly the services of that particular laborer. He can even manage to get along without the services of all of his employees for a period. But the worker has no such alternative. He must have a job or starve. The employer knows this and so he is usually able almost to dictate the terms of the bargain, which naturally will not be formulated primarily to please the employee. It is to reduce this great unevenness of the situation, to place themselves on a footing more nearly equal to that of the employer, that the employees use collective bargaining. Functioning as a unit they do possess something which the employer greatly desires. He may not care whether an individual laborer works for him or not, but

he does care if the entire group withdraws from his plant in a body.

Yoder, Dale, *Labor Economics and Labor Problems*, New York (1933), p. 438:

> In collective bargaining, an employer or an organization of employers deals with an organized group of workers. Individual workers relinquish to their unions the right to represent them in dealing with their employers. They agree not to enter into any personal or private agreement but to subscribe to whatever joint agreements are made. Individual workers subordinate themselves to the organizations to which they belong. All business relationships between employers and employees are concluded by the unions. This is collective bargaining. It is "the procedure by which an employer or employers and a group of employees agree upon the conditions of work." While it is generally thought of as involving a single employer, this is not typical. Groups of bargaining employers are not uncommon, and employers' associations, many of which have been formed for the specific purpose of concluding bargains with workers in particular industries, represent one of the most important elements in modern industrial relationships.

Daugherty, Carroll R., *Labor Problems in American Industry*, New York (1933), p. 415:

> 3. *The benefits of collective bargaining.*—Workers were not long in adopting the only alternative to individual bargaining. The latter, utterly inadequate and almost wholly futile in the face of an unfavorable industrial environment, was gradually supplanted among a large number of employees

by collective action and group solidarity. Workers learned that, if they were to have any real voice in the determination of their wages and working conditions, they would have to act together as a unit and present a united front to their employers. Competition among themselves for jobs would have to cease. The individual bargain must yield to the collective bargain. All employees must accept, in general, standard wages, standard hours, and uniform conditions of work which would be superior to the average obtainable under the old system. In the end each individual would obtain more by submitting to the discipline of the group than by playing a lone hand, because the employer, who could easily do without his particular services, might have to yield to him as one of a united group.

Taylor, Albion G., *Labor Problems and Labor Law*, New York (1938), pp. 86–87:

> Collective bargaining has been defined as "the joint determination of the terms of employment by an organization of workers and an employer, or an association of employers, acting through their duly authorized representatives."
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> * * * * *
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> To protect the worker and improve his economic status, collective bargaining is introduced, substituting group action for individual action in making and enforcing agreements. It is a method positively in conflict with the spirit of individualism, for collective bargaining implies a limitation of the individual worker's freedom to negotiate contracts governing his employ-

ment. This necessary subordination of the will of particular individuals to the collective will is often condemned as an encroachment upon the "natural right" of any person. Interference with individual bargaining is justified by trade unionists and many other people on the ground that it augments the sum total of human happiness, even though it does restrict the liberty of certain individuals.

Collective bargaining is predicated upon a recognition of the union as a legitimate and legal institution with which employers may bargain. "Recognition" constitutes an admission on the part of an employer that his employees have the right to be bound by a contract negotiated by a labor organization to which they belong, rather than by agreements made with each employee as an individual. * * *

Cooke, Morris L. & Murray, Philip, *Organized Labor & Production*, New York (1940), p. 188:

> The recognition of a union for collective bargaining implies not that the employer has taken a position of neutrality, but that he has accepted the principle that individual bargaining will be supplanted by collective bargaining as the procedure by which conditions or (sic) labor will be determined.

Golden, Clinton S. & Ruttenberg, Harold J., *The Dynamics of Industrial Democracy*, New York (1942), pp. 23, 26:

> *Collective bargaining marks the end of individual and the beginning of group relations between workers and management.*
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> * * * * *

> There is an irreconcilable conflict between union-management bargaining and management bargaining with individual workers. The two cannot exist side by side either peacefully or indefinitely.

Taft, Philip, *Economics and Problems of Labor*, Harrisburg, Penna. (1942), p. 703:

> Collective bargaining necessarily leads to the growth of definite machinery for effectuating it. The size of the groups bargaining will determine the magnitude of the machinery erected for this purpose. However, in all cases collective bargaining means transference of the authority to determine the terms of employment from the isolated individual to the group.

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SUPREME COURT OF THE UNITED STATES.

No. 67.—October Term, 1943.

J. I. Case Company, Petitioner, *vs.* National Labor Relations Board. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 28, 1944.]

Mr. Justice Jackson delivered the opinion of the Court.

This cause was heard by the National Labor Relations Board on stipulated facts which so far as concern present issues are as follows:

The petitioner, J. I. Case Company, at its Rock Island, Illinois, plant, from 1937 offered each employee an individual contract of employment. The contracts were uniform and for a term of one year. The Company agreed to furnish employment as steadily as conditions permitted, to pay a specified rate, which the Company might redetermine if the job changed, and to maintain certain hospital facilities. The employee agreed to accept the provisions, to serve faithfully and honestly for the term, to comply with factory rules, and that defective work should not be paid for. About 75% of the employees accepted and worked under these agreements.

According to the Board's stipulation and finding, the execution of the contracts was not a condition of employment, nor was the status of individual employees affected by reason of signing or failing to sign the contracts. It is not found or contended that the agreements were coerced, obtained by any unfair labor practice, or that they were not valid under the circumstances in which they were made.

While the individual contracts executed August 1, 1941 were in effect, a C. I. O. union petitioned the Board for certification as the exclusive bargaining representative of the production and maintenance employees. On December 17, 1941 a hearing was held, at which the Company urged the individual contracts as a bar to representation proceedings. The Board, however, directed

an election, which was won by the union. The union was thereupon certified as the exclusive bargaining representative of the employees in question in respect to wages, hours, and other conditions of employment.

The union then asked the Company to bargain. It refused, declaring that it could not deal with the union in any manner affecting rights and obligations under the individual contracts while they remained in effect. It offered to negotiate on matters which did not affect rights under the individual contracts, and said that upon the expiration of the contracts it would bargain as to all matters. Twice the Company sent circulars to its employees asserting the validity of the individual contracts and stating the position that it took before the Board in reference to them.

The Board held that the Company had refused to bargain collectively, in violation of § 8(5) of the National Labor Relations Act; and that the contracts had been utilized, by means of the circulars, to impede employees in the exercise of rights guaranteed by § 7 of the Act, with the result that the Company had engaged in unfair labor practices within the meaning of § 8(1) of the Act. It ordered the Company to cease and desist from giving effect to the contracts, from extending them or entering into new ones, from refusing to bargain and from interfering with the employees; and it required the Company to give notice accordingly and to bargain upon request.

The Circuit Court of Appeals, with modification not in issue here, granted an order of enforcement. The issues are unsettled ones important in the administration of the Act, and we granted certiorari. In doing so we asked counsel, in view of the expiration of the individual contracts and the negotiation of a collective contract, to discuss whether the case was moot. In view of the continuing character of the obligation imposed by the order we think it is not, and will examine the merits.

Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual

ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established. Indeed, in some European countries, contrary to American practice, the terms of a collectively negotiated trade agreement are submitted to a government department and if approved become a governmental regulation ruling employment in the unit.[1]

After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge. But the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring. This hiring may be by writing or by word of mouth or may be implied from conduct. In the sense of contracts of hiring, individual contracts between the employer and employee are not forbidden, but indeed are necessitated by the collective bargaining procedure.

But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits, any more than a shipper can contract away the benefit of filed tariffs, the insurer the benefit of standard provisions, or the utility customer the benefit of legally established rates.

Concurrent existence of these two types of agreement raises problems as to which the National Labor Relations Act makes no

[1] See Hamburger, "The Extension of Collective Agreements to Cover Entire Trade and Industries" (1939) 40 International Labor Review 153; Methods of Collaboration between Public Authorities, Workers' Organizations, and Employers' Organizations (International Labour Conference, 1940) p. 112.

express provision. We have, however, held that individual contracts obtained as the result of an unfair labor practice may not be the basis of advantage to the violator of the Act nor of disadvantage to employees. *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350. But it is urged that where, as here, the contracts were not unfairly or unlawfully obtained, the court indicated a contrary rule in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44-45, and *Virginian Railway* v. *Federation*, 300 U. S. 515. Without reviewing those cases in detail, it may be said that their decision called for nothing and their opinions contain nothing which may be properly read to rule the case before us. The court in those cases recognized the existence of some scope for individual contracts, but it did not undertake to define it or to consider the relations between lawful individual and collective agreements, which is the problem now before us.

Care has been taken in the opinions of the Court to reserve a field for the individual contract, even in industries covered by the National Labor Relations Act, not merely as an act or evidence of hiring, but also in the sense of a completely individually bargained contract setting out terms of employment, because there are circumstances in which it may legally be used, in fact, in which there is no alternative. Without limiting the possibilities, instances such as the following will occur: Men may continue work after a collective agreement expires and, despite negotiation in good faith, the negotiation may be deadlocked or delayed; in the interim express or implied individual agreements may be held to govern. The conditions for collective bargaining may not exist; thus a majority of the employees may refuse to join a union or to agree upon or designate bargaining representatives, or the majority may not be demonstrable by the means prescribed by the statute, or a previously existent majority may have been lost without unlawful interference by the employer and no new majority have been formed. As the employer in these circumstances may be under no legal obligation to bargain collectively, he may be free to enter into individual contracts.[2]

[2] Cf. National Labor Relations Board v. Sands Mfg Co., 306 U. S. 332; National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292, 297-98; National Labor Relations Board v. Brashear Freight Lines, Inc., 119 F. 2d 379; Hoeniger, "The Individual Employment Contract and Individual Bargain," 10 Fordham L. Rev. 14, 22-25.

Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. "The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices." *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 364. Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility.

It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment.

But it is urged that some employees may lose by the collective agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group and that his freedom of contract must be respected on that account. We are not called upon to say that under no circumstances can an individual enforce an agreement more advantageous than a collective agreement, but we find the mere possibility that such agreements might be made no ground for holding generally that individual contracts may survive or surmount collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining. But except as so provided, advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering

with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole. Such discriminations not infrequently amount to unfair labor practices. The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result. We cannot except individual contracts generally from the operation of collective ones because some may be more individually advantageous. Individual contracts cannot subtract from collective ones, and whether under some circumstances they may add to them in matters covered by the collective bargain, we leave to be determined by appropriate forums under the laws of contracts applicable, and to the Labor Board if they constitute unfair labor practices.

It also is urged that such individual contracts may embody matters that are not necessarily included within the statutory scope of collective bargaining, such as stock purchase, group insurance, hospitalization, or medical attention. We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement or does not amount to or result from or is not part of an unfair labor practice. But in so doing the employer may not incidentally exact or obtain any diminution of his own obligation or any increase of those of employees in the matters covered by collective agreement.

Hence we find that the contentions of the Company that the individual contracts precluded a choice of representatives and warranted refusal to bargain during their duration were properly overruled. It follows that representation to the employees by circular letter that they had such legal effect was improper and could properly be prohibited by the Board.

One minor matter remains for consideration. The literal terms of the Board's order require the Company to "cease and desist from (a) giving effect to the individual contracts of employment or any modification, continuation, extension or renewal thereof, or entering into any similar form of contract with its employees

for any period subsequent to the date of this decision," and to give written notice to each to that effect and that "such contract will not in any manner be enforced or attempted to be enforced" and that "such discontinuance of the contract is without prejudice to the assertion of any legal rights the employee may have acquired under such contract."

These provisions, it has been argued, go beyond the Board's power, leave employees free to bring but the Company powerless to defend actions on the contract, and prohibit making future contracts even when not obnoxious to the law or to any collective agreement.

The Board, of course, has no power to adjudicate the validity or effect of such contracts except as to their effect on matters within its jurisdiction. *National Licorice Co.* v. *National Labor Relations Board, supra.* The Board, however, would construe the order more narrowly than its terms suggest. It says, "The provision in question, as we have seen, is based upon the finding that the contracts were utilized as a means of interfering with rights guaranteed by the Act and constituted an obstacle to collective bargaining. Read in the context of this finding, the requirement of the cease and desist provisions enjoins petitioner only from continuing to derive benefits from the contracts heretofore utilized to forestall collective bargaining and deter self-organization, and from entering into new contracts either for the purpose of again thus utilizing them or under circumstances in which similar infringement of the collective bargaining process would be a probable consequence. The paragraph does not prevent petitioner from contracting with individual employees under circumstances which negative any intent to interfere with the employees' rights under the Act. . . . Thus construed, the challenged requirement is but a reasonable safeguard . . . ."

We agree, but the literal language of the order may well be read in quite different meaning, especially when separated from findings and standing alone in the Court's enforcement order. It then becomes the language of the Court, and the Court would not be bound to look upon the Board's construction as its own. Questions of construction had better be ironed out before enforcement orders issue than upon contempt proceedings. A party is entitled to a definition as exact as the circumstances permit of the acts which he can perform only on pain of contempt of court.

Nor should he be ordered to desist from more on the theory that he may violate the literal language and then defend by resort to the Board's construction of it. Courts' orders are not to be trifled with, nor should they invite litigation as to their meaning. It will occur often enough when every reasonable effort is made to avoid it. Where, as here, the literal language of the order goes beyond what the Board admits was intended, correction should be made. Paragraphs 1(a) and 2(a) of the decree of the court below are hereby modified, by adding the words in italics, to read as follows:

"1. Cease and desist from:

(a) Giving effect to the individual contracts of employment or any modification, continuation, extension, or renewal thereof *to forestall collective bargaining or deter self-organization*, or entering into any similar form of contract with its employees for any period subsequent to the date of this Decree *for such purpose or with such effect*.

"2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Give separate written notice to each of its employees who signed an individual contract of employment or any modification, continuation, extension, or renewal thereof, or any similar form of contract for any period subsequent to the date of this Decree, that such contract will not in any manner be enforced or attempted to be enforced *to forestall collective bargaining or deter self-organization*, that the employee is not required or expected by virtue of such contract to deal with respondent individually *in respect to rates of pay, wages, hours of employment, or other conditions of employment*, and that such discontinuance of the contract is without prejudice to the assertion of any legal rights the employee may have acquired under such contract *or to any defenses thereto by the employer.*"

As so modified the decree is

Affirmed.

Mr. Justice ROBERTS is of opinion that the judgment should be reversed.